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# AXES OF POWER: PREDICTING THE RECEPTION OF ASSERTIONS OF PRESIDENTIAL WAR POWERS IN THE COURTS

**Lieutenant Michael Bahar, JAGC, USN\***

## ABSTRACT

The sphinx-like nature of constitutional war powers are purposefully ambiguous in their allocation and definitions, yet judicial decisions that have faced presidential exertions of these powers consistently rely on three factors, or axes, to determine whether the executive prevails. First, the President's power over individuals is greatest within an authorized war against a nation, and when the individuals are connected to a foreign state at war with the United States. Second, the further from the homeland the presidential use of force is, the more likely courts are to support the President, except in cases tantamount to an invasion or insurrection. Third, the more defensive the use of force, including against certain terrorists, the more favorably the courts will view presidential powers. Exigency, while itself not an axis, provides the force-multiplier, tipping the balance towards the constitutional office most suited to decision, activity, secrecy, and dispatch.

## I. INTRODUCTION

Writers on the relative powers of the presidency versus the Congress almost invariably lapse into advocacy when they comment on the textual, historical or functional bases of war powers. Phillip Bobbitt perceptively notes that “virtually all commentary on this subject falls into one of two positions,” with evidence often selectively chosen—and selectively omitted—to forward one camp or the other.<sup>1</sup> John Yoo, for example, cites Alexander Hamilton

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<sup>1</sup> Phillip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1373 (1994). He “sarcastically” refers to this method as “lawyer's history,” notwithstanding the lawyer's true obligation to account for opposing precedent.

eleven times in an official memorandum to support originalist arguments that the Founders meant presidential war powers to be plenary and unreviewable, but cites James Madison, who consistently represents a far less expansive view of presidential power, only once.<sup>2</sup> The scholar Louis Fisher, on the other hand, embraces the “classical view” in which Congress controls the decision to initiate war, except in response to an actual armed attack, but gives markedly less attention to the equally rigorous alternatives that provide the President greater latitude to initiate force.<sup>3</sup>

In fact, very little is clear from the Founding era.<sup>4</sup> Despite fervent assertions and protestations from both camps, the Framers did not define, demarcate and delineate the power to make war. As Justice Robert Jackson eloquently stated in 1947:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the

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<sup>2</sup> The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL 34726560, \*23 n. 32 (Op. Off. Legal Counsel, September 25, 2001) (primarily authored by John Yoo). Speaking of the difficulties in “establishing proof to a criminal law standard” of an individual’s association with terrorism, Mr. Yoo nonetheless states that those difficulties do not bar the president from using “such military measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks.” *Id.* He concludes his memo by stating that, “In the exercise of his plenary power to use military force, the President’s decisions are for him alone and are unreviewable.” *Id.*

<sup>3</sup> LOUIS FISHER, PRESIDENTIAL WAR POWER (2nd ed. rev. 1995).

<sup>4</sup> See, e.g., Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 844 (1972) (“How did the Founding Fathers intend to allocate the power to use the armed forces between the President and the Congress? I do not start here because I believe that we can conjure up from their few spare words on the subject a sacred norm of Arcadian purity to which at all costs we must ‘return,’ a tight model, capable, like a magical computer or coin machine, of providing clear solutions for every contingency likely to arise. The astute men who drafted the Constitution and started it on its way had a much deeper and more realistic sense of the relationship between law and life than that.”).

largest questions in the most narrow way.<sup>5</sup>

Now two centuries of partisan debate and scholarly speculation still have yielded no net result.

And that is by design. The Framers injected elements of ambiguity into the constitutional apportionment of war powers with the expectation that the push and pull between the branches would ultimately produce policies that would keep power from crystallizing in any one body to the detriment of the body politic. Asked to rule on the legality of a sergeant's deployment order prior to the outbreak of the first Iraq War, a D.C. court commented:

The various allocations of power to the political branches in the text of the Constitution also suggest that the ambiguity as to the war powers was intentional. By exercising those powers clearly within their respective realms, the executive and legislative branches work out their roles by balancing and counter-balancing each other.<sup>6</sup>

But just because there is no constitutional bright line, does not mean that there are no prominent patterns and predictors that derive from the text and emerge from the legal and historical precedent. In fact, there are three axes of presidential war powers which can help prophesy the reception a presidential exertion will receive in the courts, as well as help shape presidential arguments in advance:

1. THE EFFECT ON INDIVIDUAL RIGHTS IN RELATION TO THE CHARACTER OF THE CONFLICT: Presidential power over individuals is greatest in an authorized war against a nation, and when those individuals are formal enemies, i.e., “the subject[s] of a foreign state at war with the United States;”<sup>7</sup>
2. THE DISTANCE FROM THE TERRITORY OF THE UNITED STATES: the further the use of force is from the homeland, the greater the extent of presidential power, except in cases tantamount to an invasion or insurrection.
3. THE DEFENSIVE CHARACTER OF UNITED STATES’ USE OF FORCE: the more defensive the use, the greater the President’s relative powers.

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<sup>5</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

<sup>6</sup> *Ange v. Bush*, 752 F. Supp. 509, 513 n.3 (D.D.C. 1990).

<sup>7</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950) (emphasis added).

Exigency, while seemingly an independent variable, is more appropriately characterized as a force multiplier, tipping the balance towards the constitutional office most suited to “[d]ecision, activity, secrecy, and dispatch.”<sup>8</sup> It most often correlates directly with Axis 3; for the more defensive the use of force, the more urgent it is likely to be, and thus the greater the presidential power is likely to be. Even the most strident congressional attempt to limit presidential war powers, the War Powers Resolution, concedes that “constitutional powers of the President as Commander-in-Chief to introduce . . . armed forces into hostilities” are triggered during a “national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>9</sup> But, importantly, as the Supreme Court stated in *Ex Parte Milligan*, “as necessity creates the rule, so it limits its duration.”<sup>10</sup>

Ultimately, presidential powers are not fixed, as Justice Jackson observed, but they fluctuate, not only in relation to their “disjunction or conjunction with those of Congress,”<sup>11</sup> but also in relation to the above axes as well. Indeed, these axes often overlay Jackson’s famous tri-partite taxonomy<sup>12</sup> and predict the judicial reception presidential exertions of power will receive at the outer edges of the presumptions. After all, even in Zone 1, in which “the President acts pursuant to an express or implied authorization of Congress,”<sup>13</sup> he enjoys only the “strongest of presumptions and the widest latitude of judicial

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<sup>8</sup> As Hamilton told the voters of New York: “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . . .” THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>9</sup> The War Powers Act, H.R.J. Res. 542, 93rd Cong. § 2(c) (1973).

<sup>10</sup> 71 U.S. 2, 80 (1866) (“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power.”).

<sup>11</sup> *Youngstown*, 343 U.S. at 635.

<sup>12</sup> He writes: (1) “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate”; (2) “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain”; and (3) “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Id.* at 635-37.

<sup>13</sup> *Id.* at 635.

interpretation,”<sup>14</sup> not complete discretion. The Court still has room to decide – and when it does, it will decide based upon the three axes of power.

Similarly, in Zone 3, where the President’s power is at its “lowest ebb” and his exertions are “scrutinized with caution,” he has his own constitutional powers “minus any constitutional powers of Congress;”<sup>15</sup> but also less those of the Court, which is particularly charged with preserving individual liberties in the face of detention.

And finally, in the “zone of twilight,” the axes of power help inform what actually constitutes “the imperatives of events and contemporary imponderables.”<sup>16</sup>

## **II. THE EFFECT ON INDIVIDUAL RIGHTS IN RELATION TO THE CHARACTER OF THE CONFLICT**

This essay constitutes the final installment in a three-part series of papers on the intersection of constitutional law and the law of armed conflict. These papers are based on the central premise that while force can be used against non-state actors, war can only be declared against states, and only state actors can be formal enemies over whom the most restrictive rights can be imposed.

What follows for purposes of this essay, which predicts the reception of presidential assertions of war powers in the courts, is that such exertions over individuals will be met with the least resistance in times of actual war – defined as an armed contention between the United States and another nation – and over formal enemies – defined as individuals affiliated with the belligerent nation.

### **1. The Constitutional Definition of War**

War has a distinct constitutional understanding, irrespective of the magnitude of an attack, and based solely on the role of the state.<sup>17</sup> “Since the Renaissance,” Philip Bobbitt notes, “brigands, pirates, feudal and religious orders, even corporations (like the Dutch East India Company) might fight but

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<sup>14</sup> *Id.* at 636.

<sup>15</sup> *Id.* at 637-38.

<sup>16</sup> *Youngstown*, 343 U.S. at 637.

<sup>17</sup> The companion article to this essay, discusses this point in more extensive detail. See Michael Bahar, *As Necessity Creates the Rule: Eisentrager, Boumediene and The Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century*, 11 U. PA. J. CONST. L. 277 (2009).

only states could sanction violence as war.”<sup>18</sup> While the Framers did not explicitly define “war” in the Constitution, they were a product of this tradition, and those that greatly influenced the Framers’ thinking on the matter all considered war a contest between states. “In pamphlet after pamphlet,” Pulitzer Prize winning historian Bernard Bailyn noted, “the American writers cited ... Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”<sup>19</sup> Hugo Grotius, for example, stated that:

Now to give a war the formality required by the law of nations, two things are necessary. In the first place it must be made on both sides, *by the sovereign power of the state*, and in the next place it must be accompanied with certain formalities.<sup>20</sup>

The Framers also adopted the leading theorists’ division of warfare into the perfect and imperfect variety by distinguishing, *within the same clause* in the Constitution, the congressional ability to “declare war” and the power to “grant Letters of Marque and Reprisal.”<sup>21</sup> But warfare of whatever variety still turned on the ability of states to sanction violence as war. Grotius continued:

Now a public war, LESS SOLEMN, may be made without those formalities, even against private persons, and by any magistrate whatever. And indeed, considering the thing without respect to the civil law, every magistrate, in case of resistance, seems to have a right to take up arms, to maintain his authority in the execution of his offices; as well as to defend the people committed to his protection. But as a whole state is by war involved in danger, it is an established law in almost all nations that no war can

<sup>18</sup> PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 125 (2008).

<sup>19</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967).

<sup>20</sup> HUGO GROTIUS, ON THE LAWS OF WAR AND PEACE, Book I, Chapter 3 (A.C. Campbell trans., London 1814), available at [http://www.constitution.org/gro/djbp\\_103.htm](http://www.constitution.org/gro/djbp_103.htm) (emphasis added). Samuel von Pufendorf also stated: “War is classified as formal and informal. For the first it is required that it be waged on both sides by authority of him who has the supreme power, and that a declaration shall have preceded. A war not declared, or waged against private citizens, is informal.” SAMUEL PUFENDORF, THE TWO BOOKS ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, Book II, Chapter XVI (Frank Gardner Moore trans., Oceana Publications Inc. 1964) (1682), available at [http://www.constitution.org/puf/puf-dut\\_216.htm](http://www.constitution.org/puf/puf-dut_216.htm). He also wrote: “The right of making war in a state belongs to him who has the supreme authority.” *Id.*

<sup>21</sup> See U.S. CONST. art. I, § 8, cl. 10 (“The Congress Shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . ”).

be made but by the authority of the sovereign in each state. There is such a law as this in the last book of Plato ON LAWS. And by the Roman law, to make war, or levy troops without a commission from the Prince was high treason. According to the Cornelian law also, enacted by Lucius Cornelius Sylla, to do so without authority from the people amounted to the same crime. In the code of Justinian there is a constitution, made by Valentinian and Valens, that no one should bear arms without their knowledge and authority. Conformably to this rule, St. Augustin says, that as peace is most agreeable to the natural state of man, it is proper that Princes should have the sole authority to devise and execute the operations of war.<sup>22</sup>

For the Framers, regardless of magnitude, the use of force by one sovereign against another sovereign constituted an act of war, while use of force by or against non-state actors, such as pirates, did not. Indeed, piracy was given its own separate constitutional provision.<sup>23</sup> While naval vessels under the command of the President could vigorously pursue and repress piracies, any captured pirates could not qualify as prisoners of war. In a Supreme Court case two years after the Constitution was ratified, the Court asked: “Whence is it that pirates have not the rights of war? Is it not because they act without authority and commission from their sovereign?”<sup>24</sup> In 1820, the Court upheld the criminal conviction of a pirate precisely because he operated under a commission issued by an illegitimate and unknown authority (the “Brigadier of

<sup>22</sup> GROTIUS, *supra* note 14. See also Burlamaqui, a Swiss jurist who also greatly influenced the Framers:

A perfect war is that, which entirely interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that, which does not entirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed.

This last species of war is generally called reprisals, of the nature which we shall give here some account. By reprisals then we mean that imperfect kind of war, or those acts of hostility, which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice .

...

J. J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 180 (Thomas Nugent trans., 5th ed. 1807) (1748 & 1752) (emphasis omitted).

<sup>23</sup> See U.S. CONST. art. I, § 8, cl. 9.

<sup>24</sup> Miller v. The Ship Resolution, 2 U.S. 1, 4 (1781).

the Mexican Republic” and “Generalissimo of the Floridas”).<sup>25</sup> And, in April 2009, the President deployed Navy SEALs against Somali pirates but charged the lone survivor with “piracy as defined by the law of nations.”<sup>26</sup> The President did not treat this individual as a prisoner of war. Any attempt to do so would likely have met with stiff judicial resistance because only states, and their agents, can constitutionally engage in war.

Accordingly, and perhaps contrary to popular belief, the United States never went to war against pirates. Rather, President Thomas Jefferson sent the Navy after agents of the states of Tripoli. In a message to Congress on December 8, 1801, he said: “Tripoli, the least considerable of the *Barbary States*, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day.”<sup>27</sup> He therefore sent a small squadron of frigates into the Mediterranean “with orders to protect our commerce against the threatened attack . . . ”<sup>28</sup>

Early Supreme Court decisions and executive practice reflected the Framers’ state-based distinction between war and the use of force perfectly. In *Bas v. Tingy*, Justice Washington stated: “It may, I believe, be safely laid down, that *every* contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.”

In the Civil War *Prize Cases*, the Court found similarly that “war” was “well defined” as the ““state in which a *nation* prosecutes its right by force”” and in a “public war,” the belligerent parties are exclusively “independent nations.”<sup>29</sup>

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<sup>25</sup> See *United States v. Klintonck*, 18 U.S. 144, 149-50 (1820). See also Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008) (demonstrating that piracy is generally outside the laws of war and captured pirates are not POWs).

<sup>26</sup> Benjamin Weiser, *Pirate Suspect Charged as Adult in New York*, N.Y. TIMES, Apr. 22, 2009, at A1.

<sup>27</sup> First Annual Message (Dec. 8, 1801), available at [http://avalon.law.yale.edu/19th\\_century/jeffmes1.asp](http://avalon.law.yale.edu/19th_century/jeffmes1.asp) (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> The Amy Warwick (The Prize Cases), 67 U.S. 635, 666 (1862) (emphasis added). The Court also explained that entities possessing all the characteristics of states (to include holding territory), but merely lacking formal recognition, are nonetheless states for whom war is a possibility:

A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

*Id.* at 666-67. See also *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878) (“The doctrine of international law on the effect of military occupation of enemy’s territory upon its former laws is well established. Though the [Civil War] was not between independent nations, but between

During that war, President Lincoln commissioned the first codification of the rules of war, which retained the state-centric construct, and made no mention of magnitude. In Article 20 of Lincoln's General Orders No. 100, originally drafted by Francis Lieber, the President defined public war as a "state of armed hostility between sovereign nations or governments."<sup>30</sup> Piracies, and other violent acts committed without authorization from a sovereign, on the other hand, were not considered acts of war:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, *without commission*, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but *shall be treated summarily as highway robbers or pirates.*<sup>31</sup>

While the concept of a war against non-state actors has come into the intense spotlight since the 9/11 attacks, the Supreme Court in *Hamdan v. Rumsfeld* nonetheless reaffirmed the state-centric definition. It held that the conflict between Al Qaeda and the United States in Afghanistan did not fall under the Geneva Conventions' definition of an international armed conflict,<sup>32</sup> a

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different portions of the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply").

<sup>30</sup> FRANCIS LIEBER, War Dep't, Adjutant General's Office, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 20 (1863), in LIEBER'S CODE AND THE LAW OF WAR (Richard Shelly Hartigan ed., 1995).

<sup>31</sup> *Id.* at art. 82 (emphasis added).

<sup>32</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-30 (2006) (holding that the Geneva Conventions' protections do not apply to a conflict with Al Qaeda on the grounds that Al Qaeda is not a signatory to the Conventions); *see also id.* at 641–42. For international commentators, war or "international armed conflict" exists exclusively between or among nations as well. L. Oppenheim defined war as a "contention between two or more States through their armed forces" (2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 202 (H. Lauterpacht ed., 7th ed. 1952)) and Yoram Dinstein, in the fourth edition to his leading treatise, writes that one element still seems common to all definitions of war: "In all definitions it is clearly affirmed that war is a contest between states." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 5 (4th ed., Cambridge University Press 2005) (quoting Clyde Eagleton, *The Attempt to Define War*, 291 INT'L CONCILIATION 236, 281 (1933)). *See also* U.N. Charter art. 2, para. 4 (the United Nations Charter, to which the United States

term that has come to replace “war” in the modern era, precisely because it was not a “conflict between nations.”<sup>33</sup>

## 2. Enemy Status and Presidential Powers over Individuals

Only once there is war between nations are there formal enemies over whom presidential power is greatest. Conversely, absent a formal state of war, and formal enemies, presidential powers are far more restricted.

Discussing *Hamdi* and *Padilla*, the original panel of the Fourth Circuit in *al-Marri v. Wright* refused to allow the President to treat the petitioner as an enemy combatant, no matter how dangerous a terrorist he was, because he lacked the nexus to an enemy state:

For unlike Hamdi and Padilla, al-Marri is not alleged to have been part of a Taliban unit, not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation, not alleged to have been on the battlefield during the war in Afghanistan, not alleged to have ever been in Afghanistan during the armed conflict there, and not alleged to have engaged in combat with United States forces anywhere in the world.<sup>34</sup>

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is a signatory, states: “All *Members* shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any *state*, or in any other manner inconsistent with the Purposes of the United Nations”) (emphasis added). Accordingly, the United Nations General Assembly’s definition of aggression is also confined to states: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State . . . .” G.A. Res. 3314 (XXIX), annex, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) (emphasis added).

<sup>33</sup> *Hamdan*, 548 U.S. at 630.

<sup>34</sup> *al-Marri v. Wright*, 487 F.3d 160, 183 (4th Cir. 2007), vacated *en banc sub nom.*, *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), vacated, *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). The original panel of the Fourth Circuit also astutely observed that since the Supreme Court has decided in *Hamdan* that the conflict with Al Qaeda in Afghanistan is not an international armed conflict, i.e., not a conflict between states, it necessarily follows that such individuals cannot be *enemy* combatants:

Common Article 3 and other Geneva Convention provisions applying to non-international conflicts (in contrast to those applying to international conflicts, such as that with Afghanistan’s Taliban government) simply do *not* recognize the ‘legal category’ of enemy combatant. As the International Committee of the Red Cross—the official codifier of the Geneva Conventions—explains, ‘an “enemy combatant” is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an *international* armed conflict;’ in contrast, ‘[i]n non-international armed conflict combatant status *does not exist*.

*al-Marri v. Wright*, 487 F.3d at 184-85 (internal citations omitted).

While the Fourth Circuit sitting en banc reversed that judgment, the Supreme Court took the extraordinary step of vacating that reversal once the new presidential administration removed al Marri from the military commission system into regular federal court.<sup>35</sup> Had the case remained before the Supreme Court, a majority would likely have curtailed this use of presidential power. Even with congressional authorization for the use of force against “those nations, *organizations, or persons*” the President determines “planned, authorized, committed, or aided” the 9/11 attacks<sup>36</sup> – placing the matter squarely within Jackson’s Zone 1 – the Court would likely have ruled that the power to define and detain enemies is constitutionally restricted to instances of state-based war and over state-based enemies.

This prediction follows strongly from precedent and longstanding executive practice. In *Johnson v. Eisentrager*, the Supreme Court denied habeas rights to five Germans convicted at court martial of war crimes for aiding the Japanese against the United States during World War II, precisely because it considered the defendants “actual enemies, active in the hostile service of an enemy power.”<sup>37</sup> Justice Jackson, writing for the majority, correctly defined the “enemy” in its “primary meaning” as “the subject of a foreign state at war with the United States,”<sup>38</sup> and accordingly, found that the President had the power to treat these individuals as prisoners of war: “We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy engaged in the hostile service of a government at war with the United States*.<sup>39</sup>

Jackson upheld this exertion of presidential power over enemies based on practice dating back to the founding:

American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that “. . . in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such.”<sup>40</sup>

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<sup>35</sup> al-Marri v. Spagone, No. 08-368. See also John Schwartz, *Plea Deal Reached for Agent of Al Qaeda*, N.Y. TIMES, May 1, 2009, at A16.

<sup>36</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

<sup>37</sup> *Eisentrager*, 339 U.S. at 778.

<sup>38</sup> *Id.* at 769 n.2.

<sup>39</sup> *Id.* at 785 (emphasis added).

<sup>40</sup> *Id.* at 772 (quoting *Griswold v. Waddington*, 16 Johns., N.Y. 438, 480 (1819)).

To treat each other as enemies meant that the President could completely cut off commercial and political intercourse between the nations, at least during perfect warfare. In *The Rapid*, for example, the Court upheld military seizure of a British ship and her cargo during the War of 1812 on the grounds that no American had a right to trade with, and thereby increase the material well-being of, the British enemy.<sup>41</sup> Even the right to transport goods purchased *prior* to the outbreak of hostilities was swept away in wartime. As “[e]very individual of the one nation must acknowledge every individual of the other nation as his own enemy-because the enemy of his country [sic]”<sup>42</sup> the Court concluded that:

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.<sup>43</sup>

During the Civil War, the Court upheld executive seizure of ships in a Confederate port because those ships’ affiliation with a belligerent nation rendered them enemies: “All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners.”<sup>44</sup>

Most important, “enemy status,” as in *Eisentrager*, meant that the President could restrict due process rights. Take the two cases of *Ex parte Quirin*<sup>45</sup> and *Ex parte Milligan*.<sup>46</sup> The outcomes of these landmark decisions turn precisely on the distinction between a formal, state-based enemy and an enemy in the more rhetorical (albeit still dangerous) sense. In *Quirin*, the Court granted habeas review, but upheld military commissions, for eight German operatives who surreptitiously landed along the East Coast of the United States during World War II, stashed their uniforms, and took steps to sabotage elements within the United States.<sup>47</sup>

In *Milligan*, on the other hand, the Supreme Court struck down the legality of the court-martial of Lamdin Milligan because he lacked the necessary state affiliation. Although Milligan had communicated with the Confederacy,

<sup>41</sup> *The Rapid, Perry, Master*, 12 U.S. 155 (1814).

<sup>42</sup> *Id.* at 161.

<sup>43</sup> *Id.* at 160-61.

<sup>44</sup> *The Amy Warwick (The Prize Cases)*, 67 U.S. at 674.

<sup>45</sup> 317 U.S. 1 (1942).

<sup>46</sup> 71 U.S. 2 (1866).

<sup>47</sup> *Ex parte Quirin*, 317 U.S. at 1-2.

conspired to seize munitions of war, and joined a secret society for the purpose of overthrowing the Government of the United States,<sup>48</sup> he never joined the Confederacy, was never directed by it, and never lived in the South. In other words, Milligan, if properly convicted, was a criminal, and a vile one at that, but he was not a constitutional enemy.<sup>49</sup> Differentiating the precedent, the *Quirin* Court affirmed that while a court-martial was impermissible for a “non-belligerent” like Milligan who was accordingly “not subject to the law of war,” it was constitutional for those like Quirin who were affiliated with the military wing of a nation at war with the United States.<sup>50</sup>

And of course, the President as Commander-in-Chief can target an enemy who is also a combatant under the laws of war.<sup>51</sup> The companion essay to this essay detailed the President’s targeting powers over enemies.<sup>52</sup> It also detailed the President’s targeting abilities over particular non-state foes like pirates and those who take a “direct part in hostilities” like certain terrorists.<sup>53</sup> But what is important to realize here is that the President’s power to target and detain is at its height over state actors. After all, these individuals have their states to champion them, as well as to protest and intervene on their behalf.<sup>54</sup>

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<sup>48</sup> See *Ex parte Milligan*, 71 U.S. at 9-10 (discussing Milligan’s lack of personal ties to the enemy).

<sup>49</sup> *Id.* at 130 (“It is proper to say, although Milligan’s trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States”).

<sup>50</sup> *Quirin*, 317 U.S. at 45-46. See also *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487)

(holding that Merryman’s status as a civilian from Maryland precluded the military from exercising judicial authority over him).

<sup>51</sup> See generally Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(1)-(2), June 8, 1977, 1125 U.N.T.S. 31 [hereinafter Protocol I]. For non-international armed conflict, see Additional Protocol II to the Geneva Conventions of August 12 1949, Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), 1123 U.N.T.S. 609. While a number of states, including the United States are not parties to the Additional Protocol, this aspect of the principle of distinction between enemy combatants and civilians is customary international law, binding on all. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19–24 (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., 2005).

<sup>52</sup> See Michael Bahar, *Power Through Clarity: How Clarifying the Old State-Based Laws Can Reveal the Strategic Power Of Law*, 30 U. PENN. INT’L L. J. 1295 (2009).

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., *Eisentrager*, 339 U.S. at 789 n.14 (“It is, however, the obvious scheme of the [Geneva Convention of July 27, 1929] that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through

While the President does have the ability to target certain non-state actors, his ability to detain them indefinitely or restrict their civil and political rights upon capture, even with congressional authorization, is greatly limited.

Were this not the case, severe constitutional infirmities would result, giving courts great pause in upholding presidential assertions of war powers over non-state actors. As Harvard Law Professor Detlev F. Vagts notes, the danger of claiming that a war against non-state actors can exist is that it “deprives the concept of the definite edges that characterized the traditional notion of war.”

It is hard to see an end or a beginning to such status. From a territorial point of view, the “battlefield” has no boundaries. Defining who is a combatant, a simple matter in *Quirin*, becomes a complex and often contentious factual issue, one on which a panel of army officers would have little expertise. It is more or less identical with the ultimate question of the individual’s guilt or innocence. One might be confronted with a long-run endemic state of “war” that would make real the anxieties captured in George Orwell’s *1984*.<sup>55</sup>

Indeed, if the President had the power to extensively target non-enemies, there would be no constitutional bar to preemptive government killings of suspected al Qaeda operatives in the United States (including U.S. citizens) although “such killings would, in peacetime, constitute extrajudicial executions.”<sup>56</sup>

Short of killing, there would still be grave constitutional infirmities if the President were able to treat non-state actors as formal enemies. *First*, without congressional authorization or even against Congress, *Youngstown* makes clear that the President can rely only on his constitutional powers less those reserved to Congress.<sup>57</sup> But he must also subtract those rights specifically

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protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention”).

<sup>55</sup> Detlev F. Vagts, *Military Commissions: Constitutional Limits on their Role in the War on Terror*, 102 AM. J. INT’L L. 573, 584 (2008).

<sup>56</sup> Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 721-22 (2004).

<sup>57</sup> See *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain”; and “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then

reserved to the Judiciary. The power to effect a taking of steel mills, for example, was reserved to Congress.<sup>58</sup> But the ability to detain all but a few limited categories of individuals is a judicial function.<sup>59</sup> Were the President, say, to indefinitely detain a pirate as an enemy combatant without evidence that this pirate was connected with a state engaged in hostilities with the United States, he would be taking on a judicial function. He would effectively be depriving someone of liberty without charge or trial.

And there would be no constitutional limiting principle to that power. If the President could declare a pirate an enemy combatant, what would keep him from declaring all alleged criminals enemy combatants, locking them up indefinitely without allowing them the right to contest their detention before a neutral and detached magistrate?

Put another way, what is the *constitutional* distinction between treating Unabomber Theodore Kaczynski or Oklahoma City bomber Timothy McVeigh as a criminal with due process rights, and Al Qaeda as enemies without due process rights? All three have committed explosive, terrorist attacks on the United States, and neither citizenship nor alienage alone provides a constitutional limiting principle. While Kaczynski and McVeigh were citizens at the time of their attacks and Al Qaeda operatives may not be, *Ex parte Quirin* demonstrates that being a citizen is no bar to being an enemy.<sup>60</sup> On the other side, the Supreme Court has consistently held that non-enemy aliens legally in the United States are entitled to the same Fifth Amendment protections as are citizens. Thus, if the President could unilaterally detain a non-enemy alien unrestrained by the Due Process Clause of the Fifth Amendment, so too could he detain an American citizen for whom the same Clause equally applies.<sup>61</sup>

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he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter”).

<sup>58</sup> Conceding that a steel strike could threaten national security by curtailing the production of armaments, the Court said that the Commander-in-Chief’s authority to prosecute a foreign war does not empower him to seize private property in an effort to resolve a domestic labor dispute. Justice Black wrote: “This is a job for the Nation’s lawmakers, not for its military authorities,” and he reminded the executive that only Congress can authorize the taking of private property for public use under the eminent domain clause of the Fifth Amendment. *Id.* at 587-89.

<sup>59</sup> See *Hamdi*, 542 U.S. at 516, 522 n.1 (military detention without criminal process of persons who “qualify as ‘enemy combatants’”). See also *Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of mentally ill sex offenders); *United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention of dangerous adults); *Schall v. Martin*, 467 U.S. 253 (1984) (pretrial detention of dangerous juveniles); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of mentally ill); *Humphrey v. Smith*, 336 U.S. 695 (1949) (courts-martial of American soldiers).

<sup>60</sup> *Quirin*, 317 U.S. at 31.

<sup>61</sup> See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348–50 (2006); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *id.* at 278 (Kennedy, J., concurring) (observing that

*Second*, even if the President acts pursuant to an express or implied congressional authorization, placing him in Jackson's Zone 1,<sup>62</sup> which some commentators argue insulates the political branches from judicial second-guessing,<sup>63</sup> the concurrence among them does not solve the grave constitutional infirmity of singling out specific non-state actors or groups as enemies. Presidential power may be at its height, but the Court will see that the executive has only shifted the problem to the Congress. Legislatively singling out non-state actors as enemies subject to indefinite detention among other deprivations is a bill of attainder,<sup>64</sup> a constitutional proscription which has never been found inapplicable against any non-enemy, alien or otherwise.<sup>65</sup>

Lawyers within the George W. Bush Administration did not appreciate that war is an essential pillar of the constitutional structure, which courts would

"[a]ll would agree . . . that the dictates of the *Due Process Clause of the Fifth Amendment* protect" an alien lawfully within the United States (emphasis added)).

<sup>62</sup> *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate").

<sup>63</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2070 (2005) ("When, as here, both political branches have treated a conflict as a "war," and that characterization is plausible, there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war"). See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 123 (2d ed. 1996) ("When the President acts by Congressional authority he has the sum of the powers of the two branches, and can be said 'to personify the federal sovereignty,' and in foreign affairs, surely, the President then commands all the political authority of the United States" (quoting *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring))).

<sup>64</sup> U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed"); see also U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . ."). Note that the Bill of Attainder has not been held to apply to the Executive. In a case involving an air traffic controller whom the Office of Personnel Management (OPM) deemed unsuitable for federal employment pursuant to President Ronald Reagan's directive indefinitely banning air traffic controllers who struck from federal employment, the Federal Circuit dismissed the controller's bill of attainder challenge. *Korte v. Office of Personnel Management*, 797 F.2d 967, 972 (C.A. Fed. 1986). The court reasoned that "the Bill of Attainder Clause was intended 'as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply-trial by legislature.'" *Id.* (quoting *United States v. Brown*, 381 U.S. 437 (1965)). "The clause," the court added, "is a limitation on the authority of the legislative branch. [The controller] has cited no authority, and we are aware of none, holding that the clause applies to the executive branch." *Korte*, 797 F.2d at 972 (internal citations omitted).

<sup>65</sup> See, e.g., *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1488 n.24 (S.D.N.Y. 1988) ("The language prohibiting bills of attainder is sweeping, and the Supreme Court's interpretations of it have been expansive. We believe there is little doubt that the ban applies to bills of attainder directed at non-citizens.") (citing *Flemming v. Nestor*, 363 U.S. 603, 612-21 (1960) (addressing and rejecting merits of bill of attainder attack by an alien, with no discussion of alien's right to invoke bill of attainder clause)). While *Mendelsohn* found that there was no bill of attainder against the Palestine Liberation Organization (PLO) despite what would otherwise seem a "classic" example of one, it only could do so by equating the PLO to a state, even as it stated that technically the PLO was not a state. See discussion in Bahar, *supra* note 11, at 301-04.

strive to uphold. Jack Goldsmith, former head of the Office of Legal Counsel (OLC), criticized many of the highest ranking Bush Administration lawyers for being “surprisingly naïve about the factors that influence Supreme Court decisionmaking.”<sup>66</sup> He attributed high court resistance to administration policies not to “controlling legal precedents,” but to extralegal factors including “suspicion” of the administration.<sup>67</sup> What he did not himself appreciate is that the issue is not just suspicion of a particular administration, but an *institutional* mistrust of *any* administration, especially when they seek to push the boundaries on what constitutes war and who is exempted from full constitutional due process. Expanding war and the enemy beyond states who can reciprocate, negotiate and retaliate, effectively renders a dead letter “the constitutional plan that allocated powers among three independent branches,” a design that makes not only Government accountable, but also secures individual liberty.<sup>68</sup> OLC and CIA memos, subsequently released by the Obama Administration, provided the legal framework for the Bush Administration’s war against non-state actors. These memos, and their aftermath, demonstrate what removing the state-based limiting principle can lead to.

To authorize severe interrogation techniques, for example, the OLC not only constructed a notoriously flawed legal argument based on existing statutes, but asserted on a constitutional level that “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander in Chief authority in the President” and that “Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate the strategic or tactical decisions on the battlefield.”<sup>69</sup> Before issuing that memo, the OLC issued its

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<sup>66</sup> JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 134 (2007).

<sup>67</sup> *Id.* at 134-35.

<sup>68</sup> Boumediene v. Bush, 128 S.Ct. 2229, 2246 (2008). Furthermore, as Justice Brandeis explained:

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.

The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). See also Loving v. United States, 517 U.S. 748, 756 (1996) (noting that “[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny”); cf. *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty”); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers”).

<sup>69</sup> Memorandum from Jay S. Bybee, Assistant Attorney General Office of Legal Counsel, to Alberto Gonzalez, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A, (Aug. 1, 2002), available at <http://www.usdoj.gov/opa/documents/olc-memos.htm>.

opinion on the critical constitutional predicate to their argument, i.e. that war and enemy status could be whatever the President said it could be.<sup>70</sup>

### 3. Executive Power to Detain Non-Enemies

But as a practical matter, presidential powers over non-enemies, including citizens and residents, on U.S. territory, can be expected to expand in response to an exigency born of an attack, or impending attack, on U.S. soil. Ultimately, during wartime – be it in the formal or more rhetorical sense – the potential for a heightening of executive authority over civil liberties is greater. According to former Chief Justice William Rehnquist, “Without question the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war.”<sup>71</sup>

Indeed, U.S. history is filled with examples of restrictions on individual liberties that have been upheld in the name of national security, only to be repealed when the war has passed. During World War I, for example, the 1917 Espionage Act and the 1918 Sedition Act placed severe limitations on First Amendment rights and were used to prosecute more than two thousand people.<sup>72</sup> American courts largely upheld the provisions of these acts in the name of national security,<sup>73</sup> while the political branches later repealed them. In 1940, the Alien Registration Act was passed, with similar limitations on free expression, which was also upheld by the courts on national security grounds and was again subsequently repealed by the political branches.<sup>74</sup>

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<sup>70</sup> Memorandum from Jay S. Bybee, Assistant Attorney General Office of Legal Counsel, to Alberto Gonzalez, Re: Determination of Enemy Belligerency and Military Detention (June 8, 2002), available at <http://www.usdoj.gov/opa/documents/olc-memos.htm> (stating that U.S. citizens like Jose Padilla could be detained without charge or trial, despite not belonging to an enemy force like that in *Quirin* because, according to the President, “the nation is at war with an international terrorist organization” and that Padilla’s “plan in itself qualifies him as a belligerent”). See also The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, *supra* note 2 (“In the exercise of his plenary power to use military force, the President’s decisions are for him alone”).

<sup>71</sup> WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218-19 (1998).

<sup>72</sup> Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (repealed 1948); Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (repealed 1921); see also, e.g., Abrams v. United States, 250 U.S. 616 (1919) (affirming convictions under the Espionage Act, as amended by the Sedition Act, against First Amendment challenges); Debs v. United States, 249 U.S. 211 (1919) (upholding the Espionage Act in the face of First Amendment challenges).

<sup>73</sup> See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 698-99 (2004).

<sup>74</sup> Alien Registration Act of 1940 (Smith Act), Pub. L. No. 76-670, 54 Stat. 670 (repealed 1950); see also Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (upholding the Smith Act against challenges based on the First Amendment right of association, the Due Process Clause of the Fifth Amendment, and the prohibition of ex post facto laws).

But the power to suspend that most fundamental individual right – the right to be free of unlimited detention via habeas corpus – most likely belongs to the legislative branch alone.<sup>75</sup> It is telling that the “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” is found in Article I of the Constitution. Justice Taney, arguably riding circuit<sup>76</sup> in *Ex parte Merryman*, struck down President Lincoln’s delegation of suspension authority to his military commanders in 1861,<sup>77</sup> stating that:

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.<sup>78</sup>

He reemphasized the point later in his opinion, in a tone perhaps reflective of a long-time animosity between President Lincoln and himself, but with constitutionally sound reasoning:

He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.<sup>79</sup>

Additionally, since the Judiciary Act of 1789,<sup>80</sup> federal courts have also possessed statutory habeas jurisdiction to review executive detention, within U.S. territory, of American citizens, absent suspension of the writ.

But, of course, nothing in the Constitution *explicitly* denies the executive suspension authority. An argument could be made that the President has the power to suspend habeas as a necessary part of his war powers,

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<sup>75</sup> See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and The War on Terror*, 120 HARV. L. REV. 2029, 2045 (2007).

<sup>76</sup> Cf. Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of The United States Constitution and the War On Terror*, 74 FORDHAM L. REV. 1475 n.130 (2005).

<sup>77</sup> On the eve of the Civil War, when Congress was out of session, President Lincoln suspended habeas corpus in response to confederate sympathizers who were burning railroad bridges in and around Baltimore that were critical to transporting state militias into Washington, D.C. to protect the Capitol from a feared confederate invasion. See REHNQUIST, *supra* note 71.

<sup>78</sup> *Merryman*, 17 F.Cas. at 148.

<sup>79</sup> *Id.* at 149.

<sup>80</sup> Judiciary Act, ch. 20, §14, 1 Stat. 73, 81-82 (1789).

especially given the Constitution's strong emphasis on national security<sup>81</sup> and fear of invasions from abroad.<sup>82</sup> If Congress was to possess sole suspension authority in times of emergency, would it make sense for the Framers to tolerate the long delay necessary to round up members of Congress from the various states and districts, even during an invasion or rebellion?<sup>83</sup> In today's world, would it make sense that only Congress could take this extreme but urgently necessary step, even if, say, planes were bearing down upon the Capitol?<sup>84</sup>

Furthermore, to employ Justice Frankfurter's "gloss of history"<sup>85</sup> approach to presidential powers, one could look to the fact that President Lincoln continued to suspend habeas even after Justice Taney acted in *Merryman*. In a July 4 special message to Congress, Lincoln railed against Taney's opinion and defended the necessity of his measure:

To state the question more directly, are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated? Even in such a case would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to

<sup>81</sup> For example, eight of the nineteen paragraphs in Article I, Section 8, of Congress' positive enumerated powers deal with war in some manner. After the procedural requirements for election of the President are enumerated in Article II, the first positive power of the President listed is the war-making power. *See U.S. CONST. art. II, § 2.* Similarly, after Article I details the procedural issues of electing members of the House and Senate, taxation for the "common Defence" is one of Congress' first enumerated powers. *U.S. CONST. art. I, § 8, cl. 1.* Even in the Preamble, security issues are mentioned three times. "[The Constitution is intended to] insure domestic Tranquility, provide for the common defence . . . and secure the Blessings of Liberty . . ." *U.S. CONST. pmb1.*

<sup>82</sup> *See, e.g.*, Rostow, *supra* note 4, at 845 ("Problems of security and of diplomacy were among the dominant preoccupations of the men who met in Philadelphia, and first among their arguments for Union. . . . The Founding Fathers were mortally afraid the United States might be dismembered as a pawn in the Great Game of European power politics").

<sup>83</sup> Alexander Hamilton famously noted: "The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *THE FEDERALIST* No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). President Lincoln exclaimed before Congress:

Now, it is insisted that Congress and not the Executive is vested with this power. But the Constitution itself is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.

Message to Congress in Special Session, July 4, 1861.

<sup>84</sup> *See Ekeland, supra* note 76, at 1511.

<sup>85</sup> *See Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) ("a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II").

preserve it?<sup>86</sup>

Lincoln's Attorney General Bates then issued an opinion the next day upholding the President's unilateral suspension powers.<sup>87</sup>

That being said, Congress later ratified Lincoln's suspensions, indicating that Congress did not accede to this unilateral executive practice. On March 3, 1863, Congress granted Lincoln the authority to discretionarily suspend the privilege of habeas corpus, while providing for limited judicial review, insofar as lists of arrestees had to be submitted to the local federal district court, and if a grand jury failed to indict, the court could order a detainee's release.<sup>88</sup> Earlier, Thomas Jefferson, in his desire to suspend habeas after the Burr conspiracy, never argued that he could do it on his own authority and acquiesced when the House of Representatives declined to pass the suspension bill.<sup>89</sup> After Lincoln, all suspensions of the privilege of habeas corpus occurred by virtue of delegated authority under an act of Congress, and no President since Lincoln has purported the power to unilaterally suspend.<sup>90</sup>

But ultimately, in a paper seeking to predict the strength of an invocation of presidential war powers within the courts, it is clear that congressional concurrence with a presidential restriction on habeas will be upheld far more readily than would a unilateral execution suspension. However, urgency cannot be lightly disregarded. Lincoln's point of extreme necessity is compelling, and because the need for restrictions on habeas often correlates with a grave threat to the homeland, the President also has the advantage of invoking the defensive axis of power as well, discussed further below.

At the same time, as necessity creates the permissive legal circumstances, it often limits its duration.<sup>91</sup> As argued in the companion article,

<sup>86</sup> Message to Congress in Special Session, July 4, 1861.

<sup>87</sup> See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Atty. Gen. 7, 4 (1861).

<sup>88</sup> See Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863) (repealed 1873).

<sup>89</sup> See Jefferson's Message Regarding the Burr Conspiracy, Jan. 22, 1807 in WILLIAM MACDONALD, SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE UNITED STATES, 165-171 (1898) ("As soon as these persons shall arrive, they will be delivered to the custody of the law, and left to such course of trial, both as to place and process, as its functionaries may direct").

<sup>90</sup> David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, Emory University School of Law Public Law & Legal Theory Research Paper Series, Research Paper No. 08-30, at 31. Suspensions have occurred in 1871 in South Carolina to combat the Ku Klux Klan, see Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15; in the occupied Philippines after the Spanish-American War, see Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692; and in Hawaii during World War II, see Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900). See also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>91</sup> See *supra* note 10.

courts should continue to act with “judicious deference” to executive claims of necessity, but they should be mindful of their constitutional duty to review such claims with “less trepidation and apology,” especially when individual rights are at stake.<sup>92</sup>

When they fail in that duty, it has often been because of fear. In one of the darkest days of the Court’s history, for example, the Supreme Court upheld executive action to intern American citizens of Japanese ancestry.<sup>93</sup> While Justice Black’s majority opinion began with a denunciation of race-based classifications, it was his deference to executive necessity mere months after the devastating Pearl Harbor sneak-attack that proved dispositive. “Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety,” Justice Black stated, could constitutionally justify a race-based curfew or internment order.<sup>94</sup> “But, exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.”<sup>95</sup> He continued with ultimate deference to the military and the executive:

The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

...

Here, as in the Hirabayashi case, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that

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<sup>92</sup> Bahar, *supra* note 17 at 329.

<sup>93</sup> See *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>94</sup> *Id.* at 218.

<sup>95</sup> *Id.*

prompt and adequate measures be taken to guard against it.<sup>96</sup>

Even though the Japanese Americans, as a group, were not enemies, and even though Congress did not formally suspend habeas, the Court nonetheless upheld the exertion of presidential war powers over the individual rights of Japanese-Americans.<sup>97</sup>

While *Korematsu* rightfully should not be considered good law, albeit never explicitly overturned, one nevertheless can expect (at times regrettably) a more deferential court in times of exigency born of the fear of domestic invasion or insurrection. After 9/11, illegal immigrants of Middle Eastern origin were kept detained for periods up to seven months while they were investigated for potential terrorist links.<sup>98</sup> During their extended detention, they claimed to endure severe treatment.<sup>99</sup> While the Eastern District of New York allowed the defendants to contest the *conditions* of their confinement, the defendants were not permitted to argue that their extended detention on immigration violations was pretextual and thus impermissible.<sup>100</sup> Judge Gleeson explained:

In the investigation into the September 11 attacks, the government learned that the attacks had been carried out at the direction of Osama bin Laden, leader of al Queda [sic], a fundamentalist Islamist group; some of the hijackers were in violation of the terms of their visas at the time of the attacks. In the immediate aftermath of these events, when the government had only the barest of information about the hijackers to aid its efforts to prevent further terrorist attacks, it determined to subject to greater scrutiny aliens who shared characteristics with the hijackers, such as violating their visas and national origin and/or religion. Investigating these aliens' backgrounds prolonged their detention, delaying the date when they would be removed.

As a tool fashioned by the executive branch to ferret out information to prevent additional terrorist attacks,

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<sup>96</sup> *Id.* (internal citations omitted).

<sup>97</sup> It should also be noted that the Equal Protection Clause of the Fourteenth Amendment had yet to be applied to the federal government.

<sup>98</sup> See *Turkmen v. Ashcroft*, 2006 WL 1662663 (E.D.N.Y. 2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

this approach may have been crude, but it was not so irrational or outrageous as to warrant judicial intrusion into an area in which courts have little experience and less expertise.<sup>101</sup>

Of course, *Turkmen* differs significantly from *Korematsu* in that in the former, the defendants were illegal immigrants and not otherwise law-abiding citizens as they were in the latter. The Judge explained that “national emergencies are not cause to relax the rights guaranteed in our Constitution,” but because these individuals were non-citizens and non-lawful residents, he deferred to the political judgment of the Executive and Congress:

Yet regarding immigration matters such as this, the Constitution assigns to the political branches all but the most minimal authority in making the delicate balancing judgments that attend all difficult constitutional questions; “nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require [courts] to equate [their] political judgment with that of” the executive or the Congress.<sup>102</sup>

### **III. DISTANCE AND DEFENSE**

The *Turkmen* decision also indicates that courts will be more deferential the more foreign and defensive the exertion of presidential power. Judge Gleeson admits that “‘terrorism’ might warrant ‘special arguments’ for ‘heightened deference to the judgments of the political branches with respect to matters of national security,’” and that deportation involves “not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques.”<sup>103</sup>

Given the heightened need for defense against terrorism, and in deference to the President’s unique position with respect to foreign affairs, Judge Gleeson concluded that:

The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to

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<sup>101</sup> *Id.* at 42-43.

<sup>102</sup> *Id.* at 43.

<sup>103</sup> *Turkmen*, 2006 WL 1662663 at 41-43.

antagonize a particular foreign country by focusing on that country’s nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.<sup>104</sup>

As the next section will show, this deference to the President in defensive operations and in matters of foreign policy does have roots in the constitutional design.

### **1. Original Understanding of Presidential Powers over Defensive and Emergency Engagements**

While the constitutional system was purposely designed to not “hurry us into war,” by removing the “power of a single man, or a single body of men, to involve us in such distress,”<sup>105</sup> it did accommodate the reality that war could be thrust upon the country at any time. Alexander Hamilton, conceding that presidential war powers were weaker than kingly powers, nonetheless reflected the general view that no matter what was decided in Philadelphia, Americans could not ultimately control what other nations do:

Admitting that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations.<sup>106</sup>

Often on the other side of presidential powers debates, James Madison concurred. He and Eldridge Gerry moved to substitute “declare war” for “make war” in an initial draft of Congress’ war power, “leaving to the Executive the power to repel sudden attacks.”<sup>107</sup> In a letter to James Monroe dated November 16, 1827, Madison also stated that, “The only case in which the Executive can

<sup>104</sup> *Id.* at 41.

<sup>105</sup> 2 The Debates in the Several State Conventions, On the Adoption of the Federal Constitution As Recommended by the General Convention at Philadelphia in 1787, at 528 (Jonathan Elliot, ed., 2d ed., Washington, D.C., U.S. Cong. 1836) (remarks of James Wilson). *See also* THE FEDERALIST NO. 4, at 45 (John Jay) (Clinton Rossiter ed., 1961) (“Absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans”).

<sup>106</sup> THE FEDERALIST NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>107</sup> MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (rev. ed. 1937).

enter on a war, undeclared by Congress, is when a state of war has ‘been actually’ produced by the conduct of another power.”<sup>108</sup>

Shortly after the Founding, Thomas Jefferson acted consistently with this offense-defense distinction. In his struggle with the Barbary powers, Jefferson took unilateral action to defend American life and property against these maritime attacks; but before Congress, he was careful not to cross the line into authorizing offensive engagements without their consent:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.<sup>109</sup>

Jefferson was being perhaps less than forthcoming with Congress, as he had given more offensive instructions to his commander while the release of the vessel may have been more a tactical decision than a legal one.<sup>110</sup> But the fact remains that legally, if not politically, he felt that presidential war powers were greater the more defensively they were characterized.

Even modern scholars who hold the most restrictive view of the President’s power to declare war, concede that according to the original documents, the President maintains the ability to respond defensively. Francis Wormuth and Edwin Firmage, for example, conclude from their meticulous research into the founding era that “Congress exclusively possesses the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, *de jure* or *de facto*,” with the only exception being the President’s power “to respond self-defensively to sudden attack upon the

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<sup>108</sup> 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 600 (Philadelphia, J.B. Lippincott & Co. 1865).

<sup>109</sup> First Annual Message (Dec. 8, 1801), available at [http://avalon.law.yale.edu/19th\\_century/jeffmes1.asp](http://avalon.law.yale.edu/19th_century/jeffmes1.asp).

<sup>110</sup> See e.g. DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 243-44 (1994).

United States.”<sup>111</sup> While the first half of their view is of course controversial,<sup>112</sup> the exception for sudden invasions is pretty much beyond debate. In *The Prize* cases, for example, the Supreme Court reviewed President Lincoln’s acts of war against the Confederate States and stated:

By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States . . . . He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . . [But i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And . . . it is none the less a war, although the declaration of it be ‘unilateral.’ . . . A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other. . . . The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.<sup>113</sup>

But of course, what actually constitutes a defensive action is open to interpretation. On the one hand, Louis Fisher has argued that the power to repel sudden attacks is limited precisely to the scenario in which the United States mainland or its expeditionary forces are actually attacked.<sup>114</sup> Robert Turner, on the other hand, reads presidential defensive powers more expansively.<sup>115</sup> Looking to Grotius, Vattel, Puffendorf and the other great international law theorists who so heavily influenced the Framers, Turner concludes that

<sup>111</sup> FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR (2d ed. 1989).

<sup>112</sup> See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242-50 (arguing that Congress’ power to declare war is a mere formalistic power, designed not to authorize hostilities but to clarify rights and duties).

<sup>113</sup> *The Prize Cases*, 67 U.S. at 668-69.

<sup>114</sup> See FISHER, *supra* note 3, at 7, 11.

<sup>115</sup> See Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely’s War and Responsibility*, 34 VA. J. INT’L. L. 903 (1994).

“defensive war” was an executive function understood to encompass<sup>116</sup> not only defense against attack on the United States (which could contain a pre-emptive element<sup>117</sup>), but also against attack on other countries and the implementing of treaties,<sup>118</sup> even if ample time exists to obtain congressional approval. The majority of war powers scholars convened by The George Washington University’s Constitution Project to analyze and prescribe how the United States government should constitutionally and prudently make the decision to use armed force abroad, articulated that:

Historical practice and logic have given meaning to the defensive war power to “repel sudden attacks,” inferred from the Commander in Chief clause. In addition to repelling attacks, this power extends arguably also to *imminent* attack when there is no time, as a practical matter, for Congress to decide. In addition, Congress has historically acquiesced in the President’s use of limited force abroad, without specific prior congressional authorization, to protect and rescue Americans when local authorities cannot or will not protect them. The power of “protective intervention” can be viewed as part of the constitutional common law demarcating the President’s defensive war power, although Congress has also legislated to regulate the power to rescue hostages.<sup>119</sup>

<sup>116</sup> This term was a familiar one to the Founders’ and differentiated from an offensive war not necessarily on the justness of the cause, but on who struck first.

<sup>117</sup> According to Jane Stromseth, “it is completely plausible” that the “Founders understood the President to possess a comparable power to act defensively to thwart imminent attacks upon the United States.” Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 862 (1996) (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)). Surveying the literature on presidential war powers, she concludes that “In short, I am not convinced, as Fisher seems to be, that the Founders understood the President’s own defensive powers to be limited so strictly to repelling sudden attacks against the United States or its forces.” *Id.* Rather, they:

would have expected the President as Commander in Chief and Chief Executive to protect the United States in a dangerous and uncertain world by repelling actual or imminent attacks against the United States, its vessels, and its armed force, but not, on his own, to go beyond this authority and effectively change the state of the nation from peace to war.

*Id.*

<sup>118</sup> *Id.* at 906-10.

<sup>119</sup> ConstitutionProject.org, Deciding to Use Force Abroad: War in a Constitutional System of Checks and Balances 28, *available at* [www.constitutionproject.org/pdf/War\\_Powers\\_Deciding\\_To\\_Use\\_Force\\_Abroad1.pdf](http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf) (internal citations omitted).

This essay does not look for that elusive bright line where defensive action becomes too offensive for inherent presidential war powers, but it does predict, by further examining the relevant case law in part II.3 below, that the more defensive the engagement (or the more defensively the President can characterize his or her use of force), the greater the reception such an executive claim of constitutional war powers will receive in the courts.

## **2. Presidential Powers over Foreign Affairs: Original Understanding and Subsequent Precedent**

The original design also indicates that the further from the homeland the exertion of presidential powers, the more likely it will be upheld—so long, of course, as the expeditionary exercise of power, absent a formal state of war, does not become more offensive than defensive.

Eugene V. Rostow has looked to the original documents throughout decades of his career and rather sagely concluded that:

[T]he President can use or threaten to use the armed forces without any action by Congress both in support of his diplomacy and in situations where international law justifies the limited and proportional use of force in times of peace in order to deal with forceful breaches of international law by another state.<sup>120</sup>

He further added that this constitutional design therefore allows “military actions to preserve the nation’s maritime rights, protect its citizens or other nationals abroad, or carry out its treaty obligations” without Congressional approval, “before or after the event.”<sup>121</sup>

In a colloquy with James Madison, Alexander Hamilton articulated the position that the President was the primary organ for foreign affairs. Defending Washington’s 1793 decision to declare American neutrality in the war between Britain and France, Hamilton argued that Article II’s grant of executive power to the President included control over foreign relations, limited only by those powers expressly granted to Congress like the ability to declare war or the

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<sup>120</sup> Eugene V. Rostow, “Once More Unto the Breach”: The War Powers Resolution Revisited, 21 VAL. U. L. REV. 1, 17 (1986).

<sup>121</sup> *Id.* at 17-18.

power to grant letters of marque and reprisal.<sup>122</sup> James Madison replied with a more restrictive view of the President's foreign affairs powers, but only as it relates to actual warfare and treaties. The executive "may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war," Madison agreed, "but the war-making and treaty-making powers were "substantially of a legislative, not an executive nature, [and therefore] the rule of interpreting exceptions strictly must narrow, instead of enlarging, executive pretensions on those subjects."<sup>123</sup>

The Supreme Court has looked to the original design and found the President more than a convenient organ over foreign powers, but the sole organ. In *United States v. Curtiss-Wright Export Company*,<sup>124</sup> Curtiss-Wright was charged with violating a Joint Resolution forbidding arms sales to countries engaged in armed conflict when the President had determined that halting such sales would contribute to the reestablishment of peace between those countries. By Executive Order, President Franklin D. Roosevelt declared arms sales to Bolivia and Paraguay to be illegal. Had the Joint Resolution "related solely to internal affairs," Justice Sutherland wrote for the majority, "it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive."<sup>125</sup> But since the "whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs," it was an entirely different story.<sup>126</sup> Going beyond President Roosevelt's own reliance on the statutory basis for his action, the Court looked to the inherent presidential powers over foreign affairs:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our

<sup>122</sup> Alexander Hamilton & James Madison, LETTERS OF PACIFICUS AND HELVEDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, 10-14 (Washington, D.C., J. Gideon & G.S. Gideon, 1845) (*quoted in Stromseth, supra* note 117, at 854 n.42).

<sup>123</sup> *Id.*

<sup>124</sup> 299 U.S. 304 (1936).

<sup>125</sup> *Curtiss-Wright*, 299 U.S. at 315.

<sup>126</sup> *Id.*

international relations, embarrassment-perhaps serious embarrassment-is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>127</sup>

The sweeping nature of this language was scaled back in later opinions,<sup>128</sup> but the fact remains: courts are more likely to defer to the President the more remote the action lies from American shores.

In denying a state's ability to prosecute for murder a federal marshal who thwarted an attempt on a Supreme Court Justice's life in California, the Supreme Court also impliedly imbued the executive with inherent authority to use force in foreign affairs. *In re Neagle* held that the President has the inherent constitutional ability to order the protection of a federal judge.<sup>129</sup> The Court found that authority to lie in the constitutional duty of the President to take care that "the laws be faithfully executed."<sup>130</sup> But the Court also extended that inherent power to use force in international relations when it rhetorically asked whether the duty to faithfully execute the laws is limited to the enforcement of acts of Congress or of treaties of the United States, "according to their express terms," or does it "include the rights, duties and obligations growing out of the Constitution itself, *our international relations*, and all the protection implied by the nature of the government under the Constitution?"<sup>131</sup>

Six decades later, in *Johnson v. Eisentrager*, Justice Jackson not only looked at the formal status of the defendants as "actual enemies," but he also leaned heavily on the fact that the defendants were captured and detained abroad. As Justice Black accurately noted in his dissent, "Since the Court expressly disavows conflict with the *Quirin* or *Yamashita* decisions, it must be relying not on the status of these petitioners as alien enemy belligerents but

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<sup>127</sup> *Id.* at 319-20.

<sup>128</sup> See, e.g., *Youngstown*, 343 U.S. at 637 n.2 (Jackson, J., concurring); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). But see HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 134 (1990) (describing a "subtle judicial revival" of the *Curtiss-Wright* theory after Vietnam and its challenge to *Youngstown*).

<sup>129</sup> See *In re Neagle*, 135 U.S. 1, 67 (1890).

<sup>130</sup> *Id.* at 64 (citing U.S. CONST. art. II, § 3).

<sup>131</sup> *Id.* (second emphasis added).

rather on the fact that they were captured, tried and imprisoned outside our territory.”<sup>132</sup>

Justice Jackson’s reliance on the location of the presidential exertion of power is consistent with his earlier, and most famous, decision on presidential powers. In *Youngstown v. Sawyer*, President Truman ordered his Secretary of Defense to seize the steel mills in an effort to avoid what was perceived as a debilitating strike for the Korean War effort. Justice Jackson, concurring in the decision to strike down the President’s assertion of Commander-in-Chief and foreign affairs powers, stated that:

But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.<sup>133</sup>

In other words, presidential powers over foreign affairs cannot, by themselves, leech into domestic soil. In fact, as was quite apparent at the time, President Truman had other, wholly domestic, motives involved in stopping the strike as well. In his Pulitzer Prize-winning study of the 33rd President, David McCullough writes that seizing the steel mills was “one of the boldest, most controversial decisions” of his presidency.<sup>134</sup>

“These are not normal times,” [Truman] would stress in his broadcast. “I have to think of our soldiers in Korea . . . the weapons and ammunition they need . . .”

But, McCullough notes, “it being an election year, with, as he saw it, his whole domestic and foreign program at issue, he had no wish to alienate labor.”<sup>135</sup> He further concluded that it was Truman’s “fundamental feeling about the giants of the steel industry, the old distrust of big corporations that he had voiced with such passion during his years in the Senate that moved him now, more than sympathy for the position of the steel workers.”<sup>136</sup>

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<sup>132</sup> *Eisentrager*, 339 U.S. at 795 (Black, J., dissenting).

<sup>133</sup> *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

<sup>134</sup> See DAVID MCCULLOUGH, TRUMAN 896 (1992).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 898.

If the President was going to effectuate a deprivation of private, domestic rights for an otherwise lawful activity, Justice Jackson would at least have expected Congress to bring the nation into a formal state of war or to otherwise have war thrust upon it. But, he continues, even if the war was a “de facto” contention between the United States and Korea, “There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants.”<sup>137</sup>

Later courts have noticed the power-divide between foreign and domestic powers, and it has tended to buy off on executive characterizations to that effect. In 1974, Philip Agee, a former employee of the Central Intelligence Agency, announced a campaign “to fight the United States CIA wherever it is operating.”<sup>138</sup> Over the next several years, Agee exposed CIA agents and sources working in other countries. When Secretary of State Alexander Haig revoked Agee’s passport, Agee filed suit claiming that Haig did not have congressional authorization to do so. Citing *Curtiss-Wright*, the Court found that the executive could revoke Agee’s passport:

Particularly in light of the broad rulemaking authority granted in the [1926 Passport] Act, a consistent administrative construction of that statute must be followed by the courts unless there are compelling indications that it is wrong. This is especially so in the areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval.<sup>139</sup>

In *United States v. Verdugo-Urquidez*, Justice Rehnquist refused to extend the Fourth Amendment to non-citizens the executive branch seizes abroad. Looking to original understanding, the Chief Justice found that “it was never suggested that the provision[s of the Fourth Amendment were] intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”<sup>140</sup> Justice Kennedy, in his more measured concurrence,

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<sup>137</sup> *Youngstown*, 343 U.S. at 643-44 (Jackson, J., concurring).

<sup>138</sup> *Haig v. Agee*, 453 U.S. 280, 283 (1981).

<sup>139</sup> *Id.* at 291. See also *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto provisions in the War Powers Resolution, the Arms Export Control Act, the Nuclear Nonproliferation Act, the National Emergencies Act and the International Emergency Economic Powers Act, to the effect that any time Congress chooses to disapprove of executive action in these areas, it would have to pass a joint resolution and present it to the president for signature, or seek a two-thirds majority to override the veto).

<sup>140</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990). But in looking at early practice, including the quasi-war with France, the Chief Justice conflates deprivations brought upon formal

cites *Curtiss-Wright* for the proposition that “we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”<sup>141</sup>

In *Ange v. Bush*, the D.C. District Court confronted a challenge to President George H.W. Bush’s posturing for war against Iraq in 1990. The Court found the servicemember’s challenge to his deployment order not ripe because “the potential substantive decision . . . concerns a matter of international, not domestic, concern, where the courts, due to the political and practical necessity discussed above, defer to the President.”<sup>142</sup> Thus, even though the implications of the presidential action would befall a U.S. citizen and his desire to stay home, the court characterized the President’s preparations for war as a matter of foreign affairs and thus subject to judicial deference.

Finally, in *Dellums v. Bush*,<sup>143</sup> also decided by the D.C. District Court during the run-up to the first Gulf War, Judge Greene warned that presidential power over foreign affairs is not immune from congressional or judicial action, but nonetheless dismissed the congressional request to enjoin President Bush from going to war against Iraq without congressional authorization. “While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation’s foreign affairs,” Judge Greene admonished, “it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs.”<sup>144</sup> On the surface, he decided the case on ripeness grounds, noting that in November 1990, two months prior to the January 15, 1991 deadline President Bush gave Saddam Hussein, President Bush had not yet made the decision to go to war. But, in reality, the run up to war was effectively well on its way by then. Underlying Judge Greene’s reasoning was the fact that the subject matter of the litigation was occurring far away from U.S. shores:

It would hardly do to have the Court, in effect, force a choice upon the Congress by a blunt injunctive decision . . . to the effect that, unless the rest of the Congress votes in favor of a declaration of war, the President, and the several hundred thousand troops he has dispatched to the Saudi Arabian desert, must be immobilized.<sup>145</sup>

enemies and deprivations brought upon non-enemy civilians. *Id.* at 267. See also discussion in Part II.2 above.

<sup>141</sup> *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

<sup>142</sup> *Ange*, 752 F. Supp. at 517.

<sup>143</sup> 752 F. Supp. 1141 (D.D.C. 1990).

<sup>144</sup> *Dellums*, 752 F. Supp. at 1146.

<sup>145</sup> *Id.* at 1150-51.

### 3. Precedent Discussing Presidential Defensive Powers

The highly significant case *Dames & Moore v. Regan*<sup>146</sup> implicates not only the President's foreign affairs powers, but the executive's heightened defensive powers as well, which vividly explains the different outcomes between it and *Youngstown*.

In *Dames & Moore*, the President invoked his foreign affairs powers to effectively limit private rights in the United States, but he did so *in response* to Iran's holding American citizens hostage – an act of imperfect war thrust upon the United States. Justice Rehnquist sustained the President's Executive Agreement with Iran which nullified attachments and suspended claims against Iran in U.S. courts. While the President's nullification order was pursuant to an explicit congressional statute—as opposed to President Truman's steel mill seizure—suspending the claims in U.S. courts was not. Justice Rehnquist, however, found in the “general tenor”<sup>147</sup> of congressional legislation, and in the “gloss” of history,<sup>148</sup> sufficient support for the proposition that Congress implicitly approves of presidential action to settle claims when doing so is a “necessary incident to the resolution of a major *foreign policy* dispute between our country and another.”<sup>149</sup>

Dean Harold Hongju Koh has sharply criticized *Dames & Moore*, arguing not only that Justice Rehnquist's opinion “inverted” the *Youngstown* doctrine in which statutory nonapproval of the President's action was construed to mean legislative disapproval, but also that it sent the President “the wrong message” that he should act first and then search for “preexisting congressional blank checks” afterwards.<sup>150</sup> But, normative issues aside, Dean Koh makes the forceful point that in the realm of foreign affairs, the president almost always wins.<sup>151</sup>

Striking high on the foreign policy axis, Justice Rehnquist's opinion also plotted a point high on the defensive axis as well, which further distinguishes it from *Youngstown*. Even Dean Koh concedes that it is “hard to fault the result” given the “crisis atmosphere” and the “national mood for support of the hostage accord.”<sup>152</sup> Looking to the Hostage Act<sup>153</sup> and

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<sup>146</sup> *Dames & Moore*, 453 U.S. at 654.

<sup>147</sup> *Id.* at 678.

<sup>148</sup> *Id.* at 686.

<sup>149</sup> *Id.* at 688 (emphasis added).

<sup>150</sup> Koh, *supra* note 128, at 140.

<sup>151</sup> *Id.* at 134-49.

<sup>152</sup> *Id.* at 139.

<sup>153</sup> 22 U.S.C. § 1732.

International Emergency Economic Powers Act,<sup>154</sup> Justice Rehnquist found a “congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns” and “in times of national emergency with respect to property of a foreign country.”<sup>155</sup>

Thus *Dames & Moore* marked high on two of three axes: the Court considered it a defensive response, made with a foreign power involving primarily foreign assets, and with the catalyst of great urgency.<sup>156</sup> Moreover, the effect on individual, domestic rights was low, precisely because the Court noted that the Agreement provided for a Claims Tribunal. Unlike in the steel seizure case, the decision to uphold the executive action in *Dames & Moore* was “buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief.”<sup>157</sup>

In *Dellums*, nine years after *Dames & Moore*, Judge Greene similarly articulated the importance of the offense-defense distinction. In response to plaintiffs’ allegations that President Bush, by amassing 380,000 troops in the Persian Gulf, was preparing “for an offensive military attack on Iraqi forces,” Judge Greene responded:

Given these factual allegations and the legal principles outlined above, the Court has no hesitation in concluding that an *offensive* entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a “war” within the meaning of Article I, Section 8, Clause 11, of the Constitution.<sup>158</sup>

“To put it another way,” Judge Greene emphatically concluded, “the Court is not prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority to ‘declare war.’”<sup>159</sup>

Ten years later, the D.C. Circuit reviewed President Clinton’s action in the NATO campaign in Yugoslavia, and one judge seemed willing to view

<sup>154</sup> 50 U.S.C. §§ 1701-1707 (1977).

<sup>155</sup> *Dames & Moore*, 453 U.S. at 677 (emphasis added).

<sup>156</sup> “[B]efore turning to the facts and law which we believe determine the result in this case,” Justice Rehnquist opened his opinion by ringing the bell of urgency, stressing the “expeditious treatment of the issues involved.” *Id.* at 660. The fact that President Carter had declared a national emergency emerged prominently and repeatedly throughout Justice Rehnquist’s opinion.

<sup>157</sup> *Id.* at 686-87. Justice Rehnquist also explicitly noted that Settlement did not terminate the petitioner’s possible taking claim against the United States. *Id.* at 689 n.14.

<sup>158</sup> *Dellums*, 752 F. Supp at 1146 (emphasis added).

<sup>159</sup> *Id.*

President's Clinton non-defensive, non-exigent use of military force as impermissible.<sup>160</sup> Judge Tatel, concurring in the opinion that several congressmen lacked standing to file suit against the President for alleged violations of the War Powers Act<sup>161</sup> and the War Powers Clause of the Constitution, insisted that courts could determine whether a state of war exists.<sup>162</sup> Contrary to his fellow judge who read "the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."<sup>163</sup> Judge Tatel responded:

Nor is the question nonjusticiable because the President, as Commander in Chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval. . . . President Clinton does not claim that the air campaign was necessary to protect the nation from imminent attack.<sup>164</sup>

#### IV. CONCLUSION

The sphinx-like nature of constitutional war powers, while purposefully ambiguous in their allocation and definitions, certainly yield valuable clues as to the factors that can tip the scales toward the President. The more the executive finds it necessary to restrict certain individual rights, the more his case will be strengthened by the presence of an actual, congressionally authorized war in which state-based enemies exist. The more the President can demonstrate his use of force, even without congressional authorization, is defensive and/or foreign (especially against traditional objects of defensive exertions like pirates or piratical terrorists), the greater the reception this argument will receive.

Conversely, when the disputed presidential exertion does not actually register high on these axes, courts should not hesitate to intervene. The Constitution allows for necessary measures, especially when the nation is imperiled, but such emergency responses should be seen like adrenaline –

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<sup>160</sup> *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000).

<sup>161</sup> *War Powers Act*, *supra* note 9. The War Powers Act also stated that the "constitutional powers of the President as Commander-in-Chief to introduce United States armed forces into hostilities" would be triggered during a "national emergency created by attack upon the United States, its territories, or its armed forces." *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Campbell*, 203 F.3d at 27 (Silberman, J., concurring).

<sup>164</sup> *Id.* at 40 (Tatel, J., concurring).

critical in times of great stress, but over time, disruptive to normal body functioning and detrimental to it.

# THE NEED FOR SENTENCING REFORM IN MILITARY COURTS-MARTIAL

**Colin A. Kisor\***

## INTRODUCTION

A military court-martial is unlike any other federal criminal jury trial in the United States for many reasons. Principal among those reasons are that it only takes two-thirds concurrence of the members to convict an accused of noncapital offenses, and the members adjudge the sentence.<sup>1</sup> While military courts-martial may function very well in correctly determining the innocence or guilt of the accused,<sup>2</sup> the present method of sentencing is inadequate for a rather counterintuitive reason: there are no statutory or procedural safeguards to protect against unreasonably light sentences for serious crimes. In fact, “no punishment” is an authorized sentence for any crime apart from premeditated murder, certain types of felony murder, and spying.<sup>3</sup> Consequently, the present system of members’ sentencing makes possible wildly inconsistent results, permitting unreasonably light sentences for very serious crimes.

This article will propose statutory reforms to the court-martial sentencing system in order to reduce the potential for inappropriately light sentences. This article argues that making the court-martial sentencing process more congruent with the federal criminal justice system will decrease the number of misdemeanor-level sentences adjudged for felony-level offenses at courts-martial. Part I will examine the historical underpinnings of the court-martial sentencing system. Part II will describe the court-martial sentencing process in detail, examining the many levels of protection built into the system to prevent a convicted servicemember from serving an inappropriately severe sentence, and pointing out the lack of remedies for an inappropriately light

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<sup>1</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(c), 1006 (2008) [hereinafter MCM]. In courts-martial, the jurors are called “members” and the jury is the “members panel.”

<sup>2</sup> Military members panels are permitted to call witnesses, recall witnesses, and examine witnesses – even witnesses not called by either the trial counsel (prosecutor) or defense counsel. See MCM, *supra* note 1, MIL. R. EVID. 614. Either counsel may object to members’ questions based on the rules of evidence. *Id.*

<sup>3</sup> See MCM, *supra* note 1, R.C.M. 1002.

sentence. Part III will argue that statutory reforms are necessary in order to better serve the needs of the military specifically and of society generally, and that this can be accomplished without any loss of constitutional protections for the individual servicemember.

This Article advances three proposals. First, the system by which the members determine the punishment should be abandoned in favor of sentencing by a military judge. Second, a system of sentencing guidelines for felony-level crimes should be adopted in order to assist the military judge (or the members if they remain the sentencing authority) in selecting an appropriate sentence. Finally, the United States should be permitted to appeal an unreasonably light sentence.

#### I. THE HISTORY OF MEMBERS SENTENCING IN MILITARY COURTS-MARTIAL

It is well-established that “a court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished.”<sup>4</sup> A military court-martial is, and has always been, a judicial system by which military persons who commit crimes may be punished without a civilian trial. The constitutionality of courts-martial derives from congressional authority to govern the armed forces.<sup>5</sup> A court-martial is convened by an officer senior enough to be vested with court-martial jurisdiction – the authority to convene courts-martial.<sup>6</sup> That officer (the convening authority) refers (sends) charges to a panel of officers (the members) for trial.<sup>7</sup>

Historically, the officers comprising a particular court-martial adjudged the sentence following a conviction, which then had to be approved or ratified by the officer who appointed the court-martial. Prior to 1920, the highest ranking officer on a court-martial served as president of the court-martial and ruled on evidence and procedure. In 1920, Congress amended the Articles of War to require a “law member” to rule on evidence and procedure. Although Congress enacted the Uniform Code of Military Justice (UCMJ) in 1951 to standardize courts-martial throughout the military services, it was not until 1968 that Congress changed the requirement that the “law member” be a “military

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<sup>4</sup> *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (citing Articles 22-24, Uniform Code of Military Justice (UCMJ)).

<sup>5</sup> *Id.* (citing U.S. CONST. art. 1, § 8, cl. 14).

<sup>6</sup> See UCMJ art. 22 (2008).

<sup>7</sup> See MCM, *supra* note 1, R.C.M. 400-407. If the accused person is an enlisted person, he or she has the right to enlisted representation on the members panel. See UCMJ art. 25(c)(1) (2008).

judge.”<sup>8</sup> What has not changed, however, in several hundred years of courts-martial, is the requirement that when court-martial members enter findings of guilty, the members – not the military judge – must adjudge the sentence.

The 1928 U.S. Army Manual for Courts-Martial articulated the guidance and procedures for Army court-martial sentencing.<sup>9</sup> Its 1928 guidance for determining a sentence was general: “To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment.”<sup>10</sup> In contrast, the procedures by which members voted on a sentence were detailed. Members voted by secret written ballot.<sup>11</sup> In accordance with the then-existing Articles of War, two-thirds concurrence was required if the sentence included less than ten years in confinement, three-fourths if the sentence included more than ten years, and unanimous if the sentence was death.<sup>12</sup> The same procedures remain in effect today in cases where the accused elects to be tried (or sentenced) by members rather than by a military judge.<sup>13</sup>

## **II. THE STRUCTURE OF A MODERN COURT-MARTIAL UNDER THE UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801-946**

A present-day court-martial looks very much like a federal jury trial.<sup>14</sup> A trial counsel (prosecutor)<sup>15</sup> presents the Government’s case, and a defense attorney (or more than one) represents the accused servicemember.<sup>16</sup> A military judge presides over the trial, ruling on matters of evidence and procedure.<sup>17</sup> At

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<sup>8</sup> The Military Justice Act of 1968 changed the title of “Law Officer” to “military judge.” 282 Stat. 1335, 1336 (1968) (current version at UCMJ art. 26 (2008)).

<sup>9</sup> MANUAL FOR COURTS-MARTIAL, U.S. ARMY, ch. XV, § 80, at 67 (1928).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 68.

<sup>12</sup> *Id.* (citing Articles of War, Art. 43, 41 Stat. 787 (1920) (repealed 1951)). Prior to 1920, only a majority of members were required to concur in a sentence, except that two-thirds were required to concur in a death sentence. See MANUAL FOR COURTS-MARTIAL, U.S. ARMY, ch. VII, § IV, at 145 (1917).

<sup>13</sup> See UCMJ art. 52 (2008); see also MCM, *supra* note 1, R.C.M. 1006. The accused at a court-martial elects a members trial or a bench trial. The Government cannot impose a particular forum.

<sup>14</sup> See Lieutenant Michael J. Marinello, JAGC, USN, *Convening Authority Clemency: Is It Really An Accused’s Best Chance at Relief?*, 54 NAVAL L. REV. 169, 171 (2007) (noting that “as it currently stands, our nation’s military justice system ‘in more ways than not, closely resembles trial in federal district court’”). In 1979, the Navy Court of Military Review decried the increasing congruity between military and civilian law practice, noting that “[m]any have certainly taken to so-called ‘civilianization’ of the United States military justice system like ducks to water.” United States v. Jones, 7 M.J. 806, 808 (N.M.C.M.R. 1979). In fact, the phrase “like ducks to water” has, in Latin translation, “*Anates Ad Aquae*,” been incorporated into the seal of the Navy-Marine Corps Appellate Defense Division, along with an image of three ducks.

<sup>15</sup> Military prosecutors are termed “trial counsel.” See UCMJ art. 27 (2008).

<sup>16</sup> UCMJ art. 27 (2008).

<sup>17</sup> UCMJ art. 26 (2008).

the election of the accused, a panel of members (a jury) decides his guilt or innocence. The standard for determination of innocence or guilt is beyond a reasonable doubt. The Military Rules of Evidence closely track, often word for word, the Federal Rules of Evidence. Defense counsel may be a military lawyer (usually more than one) provided to the defendant for free, or a civilian attorney hired by the accused, or both. The trial counsel and military judge are lawyers as well.<sup>18</sup>

There is mandatory appellate review of convictions – even guilty pleas -- to the service courts of criminal appeals when an approved sentence includes more than one year of confinement or a punitive discharge.<sup>19</sup> The military services have separate courts of criminal appeals: the Air Force, Army, and Coast Guard each have a court of criminal appeals. The Navy-Marine Corps Court of Criminal Appeals acts on appeals for both the Navy and the Marine Corps.

A convicted servicemember may petition the Court of Appeals for the Armed Forces (C.A.A.F.), an appellate court in Washington, D.C., comprised of five civilian judges, to review a decision by a service court for “good cause.”<sup>20</sup> The C.A.A.F. Rules of Practice and Procedure state that a factor in determining if “good cause” exists for discretionary review is whether the service court of criminal appeals “adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts.”<sup>21</sup> There is ultimately the potential for further appellate review of the C.A.A.F. decision to the United States Supreme Court.<sup>22</sup> C.A.A.F. must review capital cases.<sup>23</sup> Additionally, the service Judge Advocate General may send a service decision to C.A.A.F. for review, regardless of whether the defense or government prevailed.<sup>24</sup>

Notwithstanding similarities, there are also dramatic differences between courts-martial and federal jury trials. A members panel for a general court-martial in a noncapital case is comprised of five (or more) members, rather

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<sup>18</sup> At a special court-martial the trial counsel is not required to be a lawyer (but almost always is). The lead trial counsel at a general court-martial must be a lawyer. The defense counsel must be a lawyer at either forum. UCMJ art. 27(b) (2008).

<sup>19</sup> See UCMJ art. 66 (2008).

<sup>20</sup> See UCMJ art. 67(a)(3) (2008).

<sup>21</sup> C.A.A.F. R. PRAC. P. 21 (b)(5)(C). In a noncapital case, an appellant must petition C.A.A.F. for review of a service court’s decision. However, the Judge Advocate General may also order that a service court decision be reviewed by C.A.A.F without a petition. See UCMJ art. 67 (2008).

<sup>22</sup> See UCMJ art. 67, 67a (2008).

<sup>23</sup> See UCMJ art. 67(a)(1) (2008).

<sup>24</sup> See UCMJ art. 67(a)(2) (2008).

than twelve. A special court-martial only requires three (or more) members.<sup>25</sup> In noncapital cases, a concurrence of only two-thirds of the members is required to convict, rather than a unanimous vote.<sup>26</sup> Capital cases require a unanimous vote of twelve members.<sup>27</sup> The standard for a determination of innocence or guilt in a court-martial mirrors that of a civilian trial – beyond a reasonable doubt – which means that in a court-martial, a minimum of two-thirds of the members must find, beyond a reasonable doubt, that the accused committed a charged offense in order to convict.

In a members trial, the sentencing proceeding usually begins immediately after the return of a guilty verdict. Members hear witnesses and receive evidence in aggravation, extenuation and mitigation, receive further instructions on sentencing by the military judge, and deliberate on sentencing.<sup>28</sup> It is the members' sentencing process – a holdover process stemming from hundreds of years of tradition – that is antiquated and requires statutory correction.

**A. While many layers of protection exist to remedy an unduly severe sentence, none exist to prevent an inappropriately light sentence.**

Following conviction in a noncapital criminal trial in the United States district courts and in many state courts, the defendant is sentenced by a judge.<sup>29</sup> In other words, federal civilian juries do not determine the length of confinement a defendant should serve after a conviction. A rationale for judge sentencing is avoidance of wildly inconsistent results in similar cases. Federal judges are more likely to have the knowledge and experience to assess the “worth” of a particular criminal case and determine the appropriate amount of confinement.

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<sup>25</sup> See UCMJ art. 16 (2008). A special court-martial is a lesser forum than a general court-martial and may only adjudge a maximum of one year of confinement and a bad-conduct discharge, rather than a dishonorable discharge and confinement limited to the combined maximum sentences for all offenses of which an accused has been convicted, which may be adjudged by a general court-martial.

<sup>26</sup> See UCMJ art. 52 (2008).

<sup>27</sup> *Id.*

<sup>28</sup> See MCM, *supra* note 1, R.C.M. 1006.

<sup>29</sup> Some states retain a system by which a jury recommends a sentence within a statutory range. See e.g. Ark. Code Ann. § 5-4-103 (2007) (noting that if a defendant is charged and found guilty of a felony by a jury, the jury “shall fix the punishment in a separate proceeding”). In fact, the Arkansas Supreme Court once vacated a sentence of three years’ imprisonment imposed by a judge because the jury recommended a verdict of zero years’ imprisonment and a fine of zero dollars following a defendant’s conviction of second degree battery, a class D felony, for stabbing someone in the abdomen with a knife. See *Donaldson v. State of Arkansas*, 257 S.W.3d 74, 78-79 (Ark. 2007).

Moreover, unlike military judges and members' panels, federal district court judges are guided by the Federal Sentencing Guidelines,<sup>30</sup> which are designed to ensure that sentences for similar crimes are reasonably consistent. The Federal Sentencing Guidelines are advisory in nature.<sup>31</sup> The advisory guideline range is based on both the nature of the offense and a probation report on the defendant.<sup>32</sup> The guideline range is commonly broad. The United States Supreme Court has stated, "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory scheme."<sup>33</sup> However, it is also clear that the Federal Sentencing Guidelines were enacted for the purpose of moving the sentencing system "in the direction of increased uniformity."<sup>34</sup>

The military, in stark contrast, retains its anachronistic method by which the members determine the sentence, including the length of confinement in prison, with absolute discretion and little guidance. They can adjudge anything from "no punishment" to the aggregate statutory maximum sentences for all offenses of which the accused is convicted. Admittedly, for purely military offenses, such as unauthorized absence, failing to obey an order, or dereliction of duty, members might be reasonably qualified to assess an appropriate punishment. Further, with their understanding of military society, members are able to comprehend the ramifications of uniquely military punishments such as reduction in paygrade (demotion), punitive letters of reprimand, and punitive discharges, the latter of which potentially result in a total loss of future retirement benefits, even if vested. Yet, members often lack sufficient experience with the criminal justice system to determine reasonable lengths of prison terms in the absence of guidance such as a specific range of terms from which to select a sentence. For example, suppose a Soldier or Sailor were found guilty of distribution of cocaine for sharing a small amount with a friend. If members convicted the accused, they would be free to select confinement time ranging from nothing to 15 years.<sup>35</sup> If this Soldier shared his cocaine with two friends, the maximum sentence would increase to thirty years.<sup>36</sup> If the Soldier instead distributed five hundred pounds of cocaine to a person who further distributed the drug to others, the maximum sentence would

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<sup>30</sup> 18 U.S.C.S. app. (LexisNexis 2009).

<sup>31</sup> *United States v.Gall*, 128 S.Ct. 586, 594 (2007); *United States v. Booker*, 543 U.S. 220, 253 (2005). Prior to the *Booker* decision, the Federal Sentencing Guidelines were mandatory. *See Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>32</sup> *See Gall*, 128 S. Ct. at 600-602.

<sup>33</sup> *Booker*, 543 U.S. at 233.

<sup>34</sup> *Id.* at 253.

<sup>35</sup> *See MCM, supra* note 1, app. 12.

<sup>36</sup> *Id.*

remain fifteen years with no requirement at all that *any* punishment be imposed.<sup>37</sup>

Historically, members presumably adjudged sentences for crimes resulting from circumstances within their unique experiences as military officers. In 1987, the United States Supreme Court expanded the jurisdiction of courts-martial to include crimes committed by servicemembers that lacked any military connection.<sup>38</sup> As a result, military members today are routinely court-martialed for violations of federal statutes other than the military and common law crimes listed in the punitive articles of the UCMJ, some with little or no factual service connection.<sup>39</sup> This expansion has exacerbated inconsistency in sentencing because members are not, by and large, aware of sentences imposed in similar cases and often lack the perspective necessary to accurately determine appropriate confinement time. The sentencing instructions read to the members on rehabilitation, punishment, good order and discipline, and protection of society are general and presented to them in a vacuum with respect to other similar cases. Thus, members have little frame of reference to put the offense into context relative to other offenders.<sup>40</sup>

The military justice system recognizes the potential for aberrant members sentencing – at least in part – and Congress has enacted several layers of protection for servicemembers convicted at court-martial if the adjudged sentence is inappropriately severe.

### **1. The servicemember's rights during court-martial sentencing**

One military appellate judge has noted,

The military justice system, as it is currently designed and has developed -- with its post-World War II philosophy,

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<sup>37</sup> *Id.*

<sup>38</sup> See *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>39</sup> *Id.* Richard Solorio's general court-martial was convened in New York, where he was serving in the Coast Guard, to try him for the sexual abuse of another Coastguardsman's minor daughters. He had abused these girls in his privately owned residence in Alaska during a prior assignment. A military judge granted Solorio's motion to dismiss on the ground that it lacked jurisdiction under *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that a military tribunal may not try a serviceman charged with a crime that has no "service connection." On appeal, the United States Coast Guard Court of Military Review reversed the trial judge's order and reinstated the charges. On further appeal, the United States Court of Military Appeals affirmed, holding that the crimes were indeed service connected. The U.S. Supreme Court ultimately held that "service connection" was not necessary for jurisdiction.

<sup>40</sup> See U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, Ch. 8 (1 Apr. 2001) [hereinafter BENCHBOOK].

revisions, and implementation of the Uniform Code of Military Justice -- is quite paternalistic in some regards, with its numerous built-in safeguards to protect the individual servicemember in his or her quest to navigate, in his or her best interests, the treacherous waters of military discipline.<sup>41</sup>

In other words, as a matter of policy, the system is slanted in favor of the convicted servicemember.

For example, a pretrial agreement – the military equivalent of a plea bargain – is an agreement between the accused servicemember and the officer who convened the court-martial. During a judge-alone guilty plea with a pretrial agreement, a military judge conducts a “providence inquiry” to ensure the defendant is really guilty, and announces a sentence without knowing the punishment limitations of the pretrial agreement between the defendant and the officer convening the court-martial.<sup>42</sup> If the military judge (or the members in a members’ sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant “beats the deal” and receives only what the sentencing authority has adjudged. On the other hand, if the judge sentences the defendant to more confinement time than contained in the agreement, the excess is typically either suspended or disapproved. A military judge is not permitted to remedy a pretrial agreement he perceives as too lenient but may make a clemency recommendation to the Convening Authority to reduce an adjudged sentence.<sup>43</sup>

The paternalistic nature of military criminal procedure is especially evident during the sentencing proceedings. Of course, as in federal court,<sup>44</sup> the servicemember may testify on his own behalf during either trial or sentencing or both, but during sentencing proceedings the defendant may make an “unsworn statement” without being subject to cross examination by the prosecution, the military judge, or the members.<sup>45</sup> The contents of the unsworn statement are largely unfettered and may even include statements about outcomes of other cases or punishments that other people have received<sup>46</sup> or a request for a

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<sup>41</sup> United States v. Sunzeri, 59 M.J. 758, 763 (N.M. Ct. Crim. App. 2004) (Villemez, J., concurring in part and dissenting in part).

<sup>42</sup> See MCM, *supra* note 1, R.C.M. 910(f)(3).

<sup>43</sup> See MCM, *supra* note 1, R.C.M. 1106(d)(3).

<sup>44</sup> See Fed. R. Crim. P. 32(i)(4).

<sup>45</sup> See MCM, *supra* note 1, R.C.M. 1001(c)(2). The unsworn statement is an important right of the accused and military appellate courts have vigorously protected it. See United States v. Grill, 48 M.J. 131, 132 (C.A.A.F. 1998); United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1993). Federal defendants have a similar right to address the court under Fed. R. Crim. P. (32)(i)(4).

<sup>46</sup> See United States v. Sowell, 62 M.J. 150 (C.A.A.F. 2005). The holding in *Sowell* was narrow, based on the particular facts of that case: the trial counsel had opened the door to this type of

particular sentence. Unsworn statements also often address the financial impact of the case on the defendants' dependents that would result from forfeiture of pay or a punitive discharge, or address collateral consequences of the conviction, including the onerous nature of sex offender registry when applicable.

Additionally, the defense may ask the military judge to relax the rules of evidence with respect to extenuation and mitigation, allowing the defense to present letters, affidavits and other evidence – all of which could be hearsay – without the test of cross examination on either foundation or reliability.<sup>47</sup> In this regard, the military system is similar to the federal system whereby the rules of evidence do not apply at sentencing.<sup>48</sup>

These various procedures operate in concert to give a convicted servicemember every opportunity to persuade the members (or the judge in a bench trial) to give a light sentence. The government may submit matters in aggravation as well but cannot be certain of any confinement time, even for serious felonies like unpremeditated murder, rape, major drug distribution, robbery, theft, or extortion. Under the Articles of War, a court-martial could *increase or decrease* the severity of its sentence upon reconsideration, prior to authentication of the record, unless the increase was induced by an incorrect statement of the law by the prosecution.<sup>49</sup> Currently, however, a court-martial may reconsider a sentence *only* before it is announced in open court.<sup>50</sup>

The only crimes for which there is a mandatory minimum sentence are spying (not to say espionage, which is a separate crime from spying) and premeditated and felony murder.<sup>51</sup> Further, where a servicemember is prosecuted for a crime under Title 18 of the United States Code (for example, distribution of child pornography), the members are never instructed on the sentencing guideline range applicable in the district courts.

## 2. Post-trial and appellate review of the sentence

After a court-martial has adjudged a sentence, the convicted servicemember has several opportunities to have the sentence reduced. There is no mechanism, however, to increase an adjudged sentence, though any suspended portion may be vacated in the event of subsequent misconduct.<sup>52</sup>

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statement by referring to one of the accused's "co-conspirators" who had, in fact, been acquitted on the same evidence as presented in *Sowell*.

<sup>47</sup> See MCM, *supra* note 1, R.C.M. 1001(c)(3).

<sup>48</sup> See generally FED. R. EVID. 1101.

<sup>49</sup> CONRAD D. PHILOS, HANDBOOK OF COURT-MARTIAL LAW (Callaghan rev. ed. 1951).

<sup>50</sup> See MCM, *supra* note 1, R.C.M. 1009.

<sup>51</sup> See UCMJ art. 106, 106a, 118(1), and 118(4) (2008).

<sup>52</sup> See MCM, *supra* note 1, R.C.M. 1109.

This is in stark contrast to the federal system, where the United States may appeal a sentence as unreasonable.<sup>53</sup>

In *United States v. Gall*, the defendant had pleaded guilty to conspiracy to distribute ecstasy, a Schedule I controlled substance. The district judge sentenced him to thirty-six months' probation. The United States appealed the sentence on numerous grounds, including that the district judge "incorrectly concluded that a sentence of probation reflects the seriousness of the offense" and that it "created unwarranted sentencing disparities among defendants with similar records who committed similar crimes."<sup>54</sup> The Eighth Circuit held that departures from the Sentencing Guidelines, though permitted, must be supported by "extraordinary circumstances" and reversed the sentencing decision, remanding the case for resentencing.<sup>55</sup> On writ of certiorari, the United States Supreme Court reversed the Eighth Circuit, holding that because the Sentencing Guidelines are only advisory, appellate review of sentencing decisions is limited to determining whether they are reasonable. Now, appellate courts may review a district judge's sentence "whether inside, just outside, or significantly outside the Guidelines range," albeit under a deferential abuse of discretion standard.<sup>56</sup> The important point is that the United States has a mechanism to appeal an unreasonably low sentence in the federal system, but not in the military system. Under the statute governing criminal appeals in the military, a service court of criminal appeals "may act only with respect to the findings and sentence approved by the convening authority."<sup>57</sup>

**a. Clemency: An accused's "best hope" for sentence relief.**

After trial, a convicted servicemember may petition the officer who convened his or her court-martial for clemency.<sup>58</sup> Military appellate courts across the services have repeatedly noted that clemency by the convening authority is "an accused's best hope for sentence relief,"<sup>59</sup> because the convening authority, as a military commander, has wide discretion when taking "action" on a sentence and may reduce a sentence for any reason at all. As the Court of Appeals for the Armed Forces has noted, "Action on the sentence is not

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<sup>53</sup> See *United States v. Gall*, 446 F.3d 884 (8<sup>th</sup> Cir. 2006).

<sup>54</sup> *Id.* at 888.

<sup>55</sup> *Id.* at 889-890.

<sup>56</sup> See *Gall*, 128 S. Ct. at 591.

<sup>57</sup> UCMJ art. 66 (2008).

<sup>58</sup> See UCMJ art. 60 (2008); see also MCM, *supra* note 1, R.C.M. 1105.

<sup>59</sup> *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). For an excellent discussion of the history of the convening authority's power to grant clemency for a convicted servicemember, see Marinello, *supra* note 14.

a legal review.”<sup>60</sup> Rather, a convening authority considers numerous factors in determining a sentence that is “warranted by the circumstances of the offense and appropriate for the accused.”<sup>61</sup> The convicted servicemember has a right to “an individualized, legally appropriate, and careful review of his sentence by the convening authority.”<sup>62</sup>

The right to request clemency is so jealously guarded by military appellate courts that a convening authority will be disqualified – often on appeal – from taking “action” in a case where he or she has demonstrated an “inelastic attitude” toward consideration of clemency.<sup>63</sup> In *United States v. Davis*, an Air Force Airman petitioned his convening authority for clemency following his conviction. The Air Force General who convened Davis’ court-martial had publicly commented that people caught using illegal drugs would be “fully prosecuted,” and should “not come crying to him about their situations or their families.” That Air Force General was chastised by the Court of Appeals for the Armed Forces for conducting the review of Airman Davis’ clemency petition, and his “action” approving the sentence of three months’ confinement and a bad-conduct discharge was set aside.<sup>64</sup>

The clemency power is a meaningful chance for several types of relief. A convening authority is empowered to defer and waive forfeitures of pay in favor of a convicted servicemember’s dependents.<sup>65</sup> A convening authority may reduce, suspend or disapprove reduction in paygrade, a fine, a punitive discharge and any portion of confinement. In fact, a convening authority may vacate a conviction altogether by disapproving the findings.<sup>66</sup> The accused’s right to submit a request for clemency is considered to be so important that a defense counsel’s failure to submit matters can constitute ineffective assistance of counsel with only a colorable showing of possible prejudice, rather than a showing of actual prejudice.<sup>67</sup>

The Rules for Courts-Martial, however, specifically prohibit a convening authority from increasing the severity of the punishment when taking action on a sentence.<sup>68</sup> One notable exception to this rule is that “a bad-conduct discharge adjudged by a special court-martial could be changed to confinement

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<sup>60</sup> *Davis*, 58 M.J. at 101-2.

<sup>61</sup> *Id.* at 102 (citing R.C.M. 1107(d)(2)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See UCMJ art. 58b(b) (2008).

<sup>66</sup> See MCM, *supra* note 1, R.C.M. 1107(c).

<sup>67</sup> See *United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. 2005).

<sup>68</sup> See MCM, *supra* note 1, R.C.M. 1107(d).

for up to one year (but not vice versa).<sup>69</sup> The exception stems from the military's perception that a punitive discharge is more "severe" than a term of confinement. Military appellate courts agree that "a bad-conduct discharge is recognized as the most serious punishment a special court-martial may adjudge."<sup>70</sup> Nevertheless, this is a counterintuitive form of relief inasmuch as most servicemembers would consider a year in confinement at a military prison more severe than a bad-conduct discharge. In any event, this is the only way under military law by which a convening authority can, after trial, punish a servicemember by imposing confinement not adjudged by the court-martial. Oddly enough, neither the Rules for Courts-Martial nor the Discussion to those rules clarify how much confinement time would equate to a dishonorable discharge or dismissal.<sup>71</sup>

This exception is not designed to be a mechanism for the government to remedy a light sentence. It is, instead, a mechanism for mitigation – and likely absurd enough not to be seriously contemplated by those military officers who have the discretion to impose it.<sup>72</sup> In this regard, disapproval of a bad-conduct discharge and imposition of 364 days of confinement would have a significant collateral effect as well: the "relief" would deprive a convicted servicemember of the statutory appeal to the service court of criminal appeals.<sup>73</sup> Surprisingly, there is only limited caselaw addressing whether this action – provided for in the discussion section of the rule – is permissible and under what circumstances.<sup>74</sup>

A second, unrelated, form of clemency is available to convicted servicemembers, separate and apart from the convening authority's clemency. Under the UCMJ, Congress has granted the four service secretaries clemency and parole powers.<sup>75</sup> The instructions governing the Navy Clemency and Parole Board state a policy of promoting "uniformity and consistency of application of

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<sup>69</sup> *Id.*, Discussion. In 2002, the jurisdictional maximum of a special court-martial increased from six months' confinement to one year. Thus, the discussion following R.C.M. 1107(d)(1) prior to the 2002 edition of the Manual for Courts-Martial specifically stated that a bad-conduct discharge is more severe than six months' confinement. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1), Discussion (2000).

<sup>70</sup> *United States v. Cassity*, 36 M.J. 759, 766-7 (N.M.C.M.R. 1992) (Welch, J., concurring).

<sup>71</sup> The Court of Military Appeals has opined in *dicta* that "it seems to follow that a bad-conduct discharge imposed by a general court-martial could properly be commuted into substantially more than six months' confinement." *Waller v. Swift*, 30 M.J. 139, 144 (C.M.A. 1990).

<sup>72</sup> *See e.g.* *United States v. Mahers*, No. 200700324, n.1 (N.M. Ct. Crim. App. July 17, 2008).

<sup>73</sup> *Id.*; *see also* UCMJ art. 66 (2008).

<sup>74</sup> *See e.g.* *Waller*, 30 M.J. at 139. *Waller* came before the court on a petition for extraordinary relief in the nature of a writ of habeas corpus.

<sup>75</sup> *See* UCMJ art. 74 (2008).

military justice.”<sup>76</sup> The Secretary of the Navy may lessen any punishment, reduce any confinement, and even substitute an administrative discharge for a punitive discharge.<sup>77</sup> This is a powerful protection for a convicted servicemember, and a term of a pretrial agreement that would deprive a convicted servicemember of clemency consideration is unenforceable.<sup>78</sup>

**b. Military appellate courts have broader powers than civilian appellate courts to protect the defendant from an unfair result.**

A convicted servicemember’s right to appeal to the service courts of criminal appeals is significantly broader than that of any other federal appellant in most respects. Although “clemency” is a power reserved for the convening authority, military service courts of criminal appeals have the discretion to reduce an inappropriately severe sentence.<sup>79</sup> Further, a servicemember’s mandatory appeal is based on the sentence approved, which must include at least one year of confinement and/or a punitive discharge of any sort.<sup>80</sup> Thus, a servicemember does not waive his right to appellate review by pleading guilty. In fact, although an accused may withdraw from appellate review during the appellate process, the Rules for Courts-Martial prohibit any term of a pretrial agreement that would deprive the accused “of the complete and effective exercise of post-trial and appellate rights.”<sup>81</sup>

Article 66, UCMJ, governs appellate review by the service courts of criminal appeals. A servicemember may appeal his or her court-martial conviction on the basis of factual sufficiency.<sup>82</sup> The service court of criminal appeals has broad fact-finding powers and undertakes a *de novo* review of the findings and sentence.<sup>83</sup> The statute provides significant protection for servicemembers wrongfully convicted at court-martial. The test for factual sufficiency is whether, after weighing the evidence at trial and making allowances for not having personally observed the witnesses, the judges of the

<sup>76</sup> See DEP’T OF THE NAVY, SEC’Y OF THE NAVY INSTR. 5815.3J, DEP’T OF THE NAVY CLEMENCY AND PAROLE SYSTEMS pt. 2, para. 203 (12 June 2003).

<sup>77</sup> See UCMJ art. 74 (2008).

<sup>78</sup> United States v. Tate, 64 M.J. 269 (C.A.A.F. 2007); United States v. Framness, No. 200500152, 2007 CCA LEXIS 150 (N.M. Ct. Crim. App. Apr. 26, 2007).

<sup>79</sup> See UCMJ art. 66 (2008); see e.g. United States v. Byard, No. 200602288, 2007 CCA LEXIS 173, at \*6-7 (N.M. Ct. Crim. App. May 22, 2007) (denying sentencing relief, stating that “granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority”).

<sup>80</sup> See UCMJ art. 66 (2008).

<sup>81</sup> See MCM, *supra* note 1, R.C.M. 705(c)(1)(B).

<sup>82</sup> Some state criminal appellate courts also allow a limited review of factual sufficiency on appeal. See e.g. Watson v. State, 204 S.W.3d 404 (Tex. Ct. Crim. App. 2006).

<sup>83</sup> See UCMJ art. 66(c) (2008).

appellate court are convinced of the appellant's guilt beyond a reasonable doubt.<sup>84</sup> By statute, the court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members.<sup>85</sup> This provision reflects the importance placed by Congress on independent *de novo* review of courts-martial.

Service courts of criminal appeals take this obligation seriously and do exercise this robust power. *United States v. Triplett* was a contested case in which members convicted a soldier of conspiracy to commit rape, rape, forcible sodomy, larceny (of money from the victim's wallet after the rape), and false official statement for a gang rape of an intoxicated female soldier in Korea. Members sentenced him to a dishonorable discharge, reduction to paygrade E-1, total forfeitures of pay, and fifteen years' confinement.<sup>86</sup> In conducting its *de novo* factual sufficiency review of the appellant's larceny conviction, the Army Court of Criminal Appeals stated,

While we find [the victim's] testimony about the rapes and other sexual assaults to be very credible, we cannot discount the possibility, given her intoxication, the money she spent on drinks, and the trauma in the aftermath of her gang rape, that she simply lost track of how much money she had left. Upon the limited facts in the instant case, we cannot conclude that the government's evidence excludes "every fair and rational hypothesis except that of guilt."<sup>87</sup>

Article 66(c), UCMJ, also provides servicemembers protection from inappropriately severe sentences. The statute requires that the service court approve only that part of a sentence that it finds "should be approved."<sup>88</sup> Thus, an appellate court independently evaluates the sentence by giving individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of his service.<sup>89</sup> Military courts of criminal appeals may, but are not required to, consider and compare other court-martial sentences for "sentence appropriateness and relative uniformity."<sup>90</sup> Military appellate courts are only *required* to engage in sentence comparison "in those rare instances in which sentence appropriateness can be fairly determined only by

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<sup>84</sup> See *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

<sup>85</sup> See UCMJ art. 66(c) (2008); see also *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

<sup>86</sup> See *United States v. Triplett*, 56 M.J. 875 (Army Ct. Crim. App. 2002).

<sup>87</sup> *Id.* at 884 (quoting U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, at 53 (30 Sept. 1996)).

<sup>88</sup> UCMJ art. 66(c) (2008).

<sup>89</sup> See *United States v. Joyner*, 39 M.J. 965, 966 (A.F.C.M.R. 1994); see also *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

<sup>90</sup> See *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001).

reference to disparate sentences adjudged in closely related cases.”<sup>91</sup> In *Triplett*, the Army Court of Criminal Appeals held that PFC Triplett’s sentence was “disproportionately severe,” and reduced the confinement portion of PFC Triplett’s adjudged sentence of fifteen years to ten years’ confinement, because his two co-conspirators who were convicted of the rape and conspiracy to commit rape of the same female soldier received sentences which included five and six years’ confinement, respectively.<sup>92</sup>

Again, although a service court of criminal appeals may *reduce* a severe sentence, nothing in the statutes allows an appellate court to *increase* an unreasonably light sentence. Therefore, the allowable sentence comparison is obviously one sided. The United States should have some mechanism to appeal an unreasonably low sentence under an abuse of discretion standard. Moreover, the lack of safeguards against inappropriately light sentences could be remedied at the trial level. Members should not engage in sentencing. Alternatively, if the system continues to permit members sentencing, the members should have less discretion and more guidance in formulating an appropriate sentence within a reasonable range.

**B. Allowing the members to determine the sentence can produce irrational and inconsistent results which call into question the efficacy of the military justice system.**

In stark contrast to the civilian system of random selection for jury duty, court-martial members are personally selected by the convening authority. They are members of the armed forces who “in [the convening authority’s] opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament.”<sup>93</sup> However, they do not ever receive specialized training in how to sentence offenders. In fact, they only receive generalized guidance on sentencing in the form of instructions by the military judge following conviction.<sup>94</sup> Members, therefore, must adjudge a sentence in a vacuum with respect to other cases. This problem is compounded by the lack of sentencing guidelines for specific offenses. There are maximum sentences for each offense, but no minimum sentence for most offenses.

Members’ treatment of rape and other sexual assault cases provides the best illustration of this problem. Rape is not a military-specific crime (in contrast to unauthorized absence, disobeying an order, etc.). It is cognizable in the civilian world. It is proscribed by Article 120, UCMJ, for military members.

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<sup>91</sup> United States v. Southen, 54 M.J. 294, 296 (C.A.A.F. 2001).

<sup>92</sup> See *Triplett*, 56 M.J. at 885.

<sup>93</sup> UCMJ art. 25 (2008).

<sup>94</sup> See BENCHBOOK, *supra* note 40, at ch. 8, § III.

The maximum punishment that a court-martial may adjudge for rape is life in prison without the eligibility for parole, but there is no mandatory minimum sentence.<sup>95</sup> In contrast, a conviction for aggravated sexual abuse (rape)<sup>96</sup> under the Federal Sentencing Guidelines would yield a probable sentence to confinement ranging *between* 91 and 121 months, assuming the defendant had no criminal record.<sup>97</sup>

Because UCMJ offenses are not divided into misdemeanors and felonies, the military sentencing instructions do not offer any indication about the gravity of a rape conviction, apart from stating the maximum allowable punishment.<sup>98</sup> Further, convictions of sexual assault offenses, especially when the accused has raised either consent or mistake of fact as a defense, are especially liable to the imposition of light sentences because they are often the result of divided decisions. Members who vote for acquittal are unlikely to vote for a severe sentence, remaining unconvinced of the accused's guilt. Thus, compromise verdicts and sentences can lead to puzzling results.

This problem is endemic in the system and across the services. Although rape is a felony in every state system that differentiates between misdemeanors and felonies, members commonly give misdemeanor-type sentences (sentences which include less than a year in jail) because they lack any instructions indicating the severity of rape in comparison to other offenses. The problem is that the system – in its current form – permits members to sentence servicemembers for rape to the same punishment commonly adjudged for marijuana use.

In *United States v. Coates*, officer and enlisted members at a general court-martial sentenced the accused, a junior enlisted Marine, to *confinement for 90 days*, forfeiture of \$500 pay per month for a period of three months, reduction to paygrade E-1, and a bad-conduct discharge from the service for raping a fellow Marine.<sup>99</sup> In *United States v. Willis*, a general court-martial at Langley Air Force Base, officer members sentenced that defendant to a dishonorable discharge, hard labor *without confinement* for three months, and reduction to pay grade E-1 for raping a seventeen-year-old high school

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<sup>95</sup> The maximum punishment for rape, as listed in the 2005 Manual for Courts-Martial, is “[d]eath or such other punishment as a court-martial may direct” although rape is never referred to as a capital offense. Thus, members are instructed that the maximum punishment is confinement for life without eligibility for parole. MCM, *supra* note 1, pt. IV, ¶ 45.f (1).

<sup>96</sup> See 18 U.S.C.S. § 2241 (LexisNexis 2009).

<sup>97</sup> See 18 U.S.C.S. app., ch. 5, pt. A (LexisNexis 2009). To be tried in a federal district court, the crime would have had to occur in an area of federal jurisdiction.

<sup>98</sup> See BENCHBOOK, *supra* note 40, at ch. 8, § III.

<sup>99</sup> United States v. Coates, No. 200000920, 2003 CCA LEXIS 124 (N.M. Ct. Crim. App. May 12, 2003).

student.<sup>100</sup> In another Air Force general court-martial, officer members convicted and sentenced an Airman to a bad-conduct discharge and confinement for three months for raping a fellow Airman.<sup>101</sup> And at a special court-martial (where there was then a cap on confinement of six months based on the forum) officer members sentenced a Coast Guard petty officer to a bad-conduct discharge and only two months' confinement for raping a fellow petty officer.<sup>102</sup>

The sentences in these cases mirror those often adjudged in courts-martial for misdemeanor level drug offenses. In one case, Air Force members sentenced an Airman to confinement for three months and a bad-conduct discharge for a single use of marijuana.<sup>103</sup> In another case, Army members sentenced a soldier to six months' confinement and a bad-conduct discharge for marijuana use.<sup>104</sup>

A system of sentencing that permits such results embarrasses the military justice system. Sentencing reform of some sort is therefore necessary. Statistics illuminating the full extent of this problem are not available in publicly accessible electronic databases because of the statutory nature of the military appellate system. Under Article 66, UCMJ, an appeal to the service court of criminal appeals occurs only when the sentence approved by the convening authority extends to a punitive discharge or a year or more of confinement.<sup>105</sup> The mechanism for appealing general court-martial cases with a lesser sentence is set forth in Article 69, UCMJ, which provides for legal review by a judge advocate within the office of the service Judge Advocate General. The Judge Advocate General of the convicted servicemember's military department may take corrective action or may refer the case to the service court of criminal appeals, which is the only way the case would ever be reported in the Military Justice Reporter.<sup>106</sup>

For example, in *United States v. Datz*, a general court-martial of officer and enlisted members convicted the accused of, among other things, raping a female Coast Guard petty officer at her townhouse.<sup>107</sup> The members sentenced him to confinement for only three months and reduction in paygrade from E-5 to

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<sup>100</sup> See *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995).

<sup>101</sup> See *United States v. Morgan*, 40 M.J. 389 (C.M.A. 1994).

<sup>102</sup> *United States v. Webster*, 40 M.J. 384 (C.M.A. 1994).

<sup>103</sup> *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005).

<sup>104</sup> *United States v. Moore*, 36 M.J. 329 (C.M.A. 1993).

<sup>105</sup> See UCMJ art. 66 (2008).

<sup>106</sup> See UCMJ art. 69 (2008). Article 69 review provides a procedural protection for a convicted servicemember who would be otherwise deprived of an appeal to the appellate courts by a light sentence. Under Article 69, the service Judge Advocate General must review general courts-martial when the sentence does not provide for Article 66 review by the service court of criminal appeals. The service Judge Advocate General may send the case to the court of criminal appeals for review.

<sup>107</sup> *United States v. Datz*, 61 M.J. 37 (C.A.A.F. 2005).

E-3. The members did not adjudge a punitive discharge.<sup>108</sup> Upon Article 69 review of the case, the Acting Judge Advocate General of the Coast Guard directed the Coast Guard Court of Criminal Appeals to review the record, which is the only reason the case was published in the Military Justice Reporter. The Court of Appeals for the Armed Forces then reversed Petty Officer Datz's conviction as to the rape charge.<sup>109</sup>

Even an exhaustive review of the military justice reporters provides no answer to the question of how many general courts-martial convict servicemembers of serious felony-level offenses (and what types) and then adjudge a sentence of less than a year in confinement without a punitive discharge. Yet, this type of finding-sentencing disparity unquestionably occurs. For example, in November 2007, members in a general court-martial held in Groton, CT, convicted a first class petty officer of repeatedly sodomizing and taking indecent liberties with a minor in violation of Articles 120 and 134, UCMJ.<sup>110</sup> The members sentenced the defendant to only 90 days' confinement, a reprimand, and reduction to paygrade E-4, without discharging him from the Navy.<sup>111</sup> Because the sentence did not include either a punitive discharge or confinement in excess of a year, the case will not be appealed under Article 66, UCMJ and will not appear in the military justice reporters absent action by the Judge Advocate General under Article 69(d), UCMJ. Thus, this type of problem – a felony-level conviction and a sub-jurisdictional sentence – remains largely invisible for statistical purposes.

The Court of Appeals for the Armed Forces' "Annual Report of the Code Committee on Military Justice" for 2007 provides some limited information on sub-jurisdictional sentences, but more is needed. In fiscal year 2007, for example, the Army Judge Advocate General received 221 records of trial of general courts-martial for Article 69 review; the Navy Judge Advocate General received 32; the Air Force Judge Advocate General received 52; and the Coast Guard Judge Advocate General received 2.<sup>112</sup> Thus, there were 307 records of general courts-martial received for which the sentence did not include a punitive discharge or greater than one year in confinement. It does not appear that anyone has conducted a review of these records to determine whether or not they substantiate the imposition of unreasonably low sentences for the charges upon which the accused were convicted.

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<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See Commander, Navy Region Mid-Atlantic, Gen. Order No. 5-08 (18 March 2008) (attached as Appendix A).

<sup>111</sup> See *id.* at 4.

<sup>112</sup> COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 OCT. 2006-30 SEPT. 2007 (2007).

**III. STATUTORY REMEDIES ARE NECESSARY TO REFORM THE COURT-MARTIAL SENTENCING PROCESS TO A SYSTEM WHICH IS BOTH FAIR TO THE DEFENDANT AND SERVES THE NEEDS OF THE MILITARY AND SOCIETY.**

The 1928 U.S. Army Manual for Courts-Martial recognized that “[t]he imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute.”<sup>113</sup> Given the number of puzzlingly light sentences for serious felony level crimes adjudged in courts-martial by members, particularly in sexual assault cases, it is clear that some structural reform to the sentencing process is necessary. There are several possible solutions which, alone or in some combination, could restore a proper balance – and some credibility – to the court-martial sentencing process.

In 1989, shortly after the United States Supreme Court announced its decision in *Mistretta*, then upholding the constitutionality of the Federal Sentencing Guidelines, the Coast Guard Court of Military Review – in the context of multiplicity -- discussed some hypothetical situations and the “obvious absurdity” of the results permitted by a system which calculates the maximum punishment as a sum of the sentences imposed for all charges of which the accused is convicted.<sup>114</sup> The court concluded, “[P]ossibly some sort of sentencing guidelines for military courts would assist judges and juries in arriving at fair and just sentences, especially where multiple offenses are involved.”<sup>115</sup> The concern of this article is not with excessive sentencing but rather the opposite, and the solution is either the elimination of members sentencing altogether or, at bare minimum, the provision of specific guidelines to members if they are to continue adjudging sentences.

The problem of compromise findings and sentences begins with members determining a sentence in a vacuum without the benefit of guidelines, particularly in the case where the findings were not unanimous. Specifically, most members lack adequate knowledge of the military justice system and the ranges of sentences being imposed in similar cases. Moreover, during voir dire the members are instructed that they must be able to consider the full range of sentences for a given offense, to include a sentence of “no punishment” – even for serious felonies. In fact, a member who states that he or she cannot consider “no punishment” in the event of a conviction could be successfully challenged for cause if the member displayed an “inelastic attitude” toward sentencing,

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<sup>113</sup> MANUAL FOR COURTS-MARTIAL, U.S. ARMY, ch. XV, § 80, at 67 (1928).

<sup>114</sup> United States v. Turner, 28 M.J. 556 (C.G.C.M.R. 1989).

<sup>115</sup> *Id.* at 560.

albeit a predisposition to impose some punishment is not automatically disqualifying.<sup>116</sup> The Court of Appeals for the Armed Forces has noted that “[i]t is not surprising that the notion of ‘no punishment’ has bedeviled this Court for most of its history. A punishment of no punishment appears to be an oxymoron, but it is a valid punishment.”<sup>117</sup> The court further noted, in the same case, that “the Supreme Court observed that ‘Congress does not create criminal offenses having no sentencing component.’”<sup>118</sup> In short, it is a defect that members are instructed that they must consider “no punishment,” even in serious felony-level cases such as unpremeditated murder (apart from felony murder), manslaughter, rape, narcotics distribution, fraud, arson, and child molestation.

Sentencing proceedings conducted before a military judge alone would at least solve the problem of members adjudging wildly inconsistent sentences. Military judges are experienced in military law and have at least a frame of reference within which to judge the worth of a case. Military judges also have a clear understanding of the collateral consequences of a conviction, including the potential for sex offender registration, loss of retirement benefits, administrative processing for discharge, the impact of a reduction in pay grade on high year tenure, etc. Thus, sentencing by a military judge would further the process of the “civilianization” of military courts-martial without any erosion in fairness to the accused.

There are other reforms that would dramatically improve the sentencing process as well, irrespective of whether the sentence was adjudged by members or by a military judge. Sentencing guidelines should be promulgated, and members (and judges) should be instructed to consider them. As part of creating guidelines for punishment, the criminal offenses listed in the UCMJ should be divided into three categories: misdemeanors, felonies, and purely military offenses. A sentence of “no punishment” should not be available for a felony level offense. Further, when a military member is prosecuted for a violation of Title 18 of the United States Code, such as distribution of child pornography under 18 U.S.C. 2252A (and related statutes), the members should be instructed to consider as a factor the Federal Sentencing Guidelines’ range of confinement.<sup>119</sup> Finally, Congress should create a statutory mechanism for the convening authority or the United States to appeal an unreasonably low sentence.

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<sup>116</sup> *United States v. Rolle*, 57 M.J. 187 (C.A.A.F. 2000) (“The test is whether the member’s attitude is of such a nature that he will not yield to the evidence presented and the judge’s instructions”); *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979). “[A]n inflexible member is disqualified; a tough member is not.” *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999).

<sup>117</sup> *Rolle*, 57 M.J. at 191.

<sup>118</sup> *Id.* (citing *Ball v. United States*, 470 U.S. 856, 861 (1985)).

<sup>119</sup> Because a court-martial is a federal criminal trial, the constitutional protection against double jeopardy applies and a servicemember who is adjudged an unreasonably light sentence by a court-martial cannot be re-prosecuted by the United States in federal district court.

It bears repeating that none of these proposed structural reforms to the sentencing process would erode the constitutional rights of servicemembers convicted at court-martial, because they would only bring the military justice system into alignment with the federal criminal justice system. In fact, decreasing the number of differences between a court-martial and a federal criminal trial arguably only enhances a military accused's due process and equal protection rights. A court-martial must be fair, both substantively and procedurally, to the accused and the government. Punishments should also be fair to both the accused and the government. Since courts-martial are open to the public, and the results are public records, the military justice system must be able to withstand public scrutiny. There is no compelling argument, apart from tradition, for member sentencing, but if members are to continue determining sentences, they should at least have the benefit of specific sentencing guidelines to assist them in differentiating between those offenses that deserve significant imprisonment and those that do not.


**DEPARTMENT OF THE NAVY**

COMMANDER  
NAVY REGION, MID-ATLANTIC  
1510 GILBERT ST.  
NORFOLK, VA 23511-2737

IN REPLY REFER TO:

**DNA PROCESSING REQUIRED 10 U.S.C. §1565**GENERAL COURT-MARTIAL ORDER NO. 5-08**[18 MAR 2008]**

Before a general court-martial convened at Region Legal Service Office Mid-Atlantic Detachment Groton, Connecticut, pursuant to Commander, Navy Region, Mid-Atlantic General Court-Martial Convening Order 01-07 of 24 January 2007, and as amended by Commander, Navy Region, Mid-Atlantic General Court-Martial Amending Order 01I-07 of 5 November 2007, Damage Controlman First Class James R. Robinson, U.S. Navy, (b)(6) was arraigned and tried on the following offenses and the following findings or other dispositions were reached:

**Charge I: Violation of the UCMJ, Article 120  
(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)**

Specification 1: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 1999 to on or about June 2001, rape (b)(6) a person who had attained the age of 12 years, but was under the age of 16 years.

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 2: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Jacksonville, Florida, on divers occasions, from on or about 1 July 2002 to on or about 31 August 2002, rape (b)(6)

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

**Charge II: Violation of the UCMJ, Article 125  
(PLEA - NOT GUILTY) (FINDING - GUILTY)**

Specification 1: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active

**DNA PROCESSING REQUIRED 10 U.S.C. §1565**

duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 1999 to on or about June 2001, commit an indecent act upon the body of (b)(6) (b)(6) a female under 16 years of age, not the wife of the said Damage Controlman First Class James R. Robinson, by fondling the breasts of the said (b)(6) (b)(6) with the intent to gratify the sexual desires of the said Damage Controlman First Class James R. Robinson.

(PLEA - NOT GUILTY) (FINDING - GUILTY)

Specification 2: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 1999 to on or about June 2001, commit an indecent act upon the body of (b)(6) (b)(6) a female under 16 years of age, not the wife of the said Damage Controlman First Class James R. Robinson, by fondling and digitally penetrating the vagina of the said (b)(6) with the intent to gratify the sexual desires of the said Damage Controlman First Class James R. Robinson.

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 3: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on or about November 1998, take indecent liberties with (b)(6) (b)(6) a female under 16 years of age, not the wife of the said Damage Controlman First Class James R. Robinson, by displaying a movie of men and women engaging in sexual acts to the said (b)(6) with the intent to gratify the sexual desires of the said Damage Controlman First Class James R. Robinson.

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

**DNA PROCESSING REQUIRED 10 U.S.C. §1565**

duty, did, at or near Jacksonville, Florida, on divers occasions, from on or about 1 July 2002 to on or about 31 August 2002, commit sodomy with (b)(6)  
(b)(6) by inserting the said Damage Controlman First Class James R. Robinson's penis into the mouth of the said (b)(6) by force and without the consent of the said (b)(6)

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 2: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on or about April 2005, commit sodomy with (b)(6)  
by inserting the said Damage Controlman First Class James R. Robinson's penis into the mouth of the said Ms.

(b)(6) by force and without the consent of the said (b)(6)

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 3: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 2000 to on or about June 2001, commit sodomy with (b)(6) a person who had attained the age of 12 years, but was under the age of 16 years, by inserting the said Damage Controlman First Class James R. Robinson's penis into the mouth of the said (b)(6) by force and without the consent of the said (b)(6)

(PLEA - NOT GUILTY) (FINDING - GUILTY, except for the words "that the act was done by force and without the consent of (b)(6)"

Charge III: Violation of the UCMJ, Article 134  
(PLEA - NOT GUILTY) (FINDING - GUILTY)

Specification 1: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active

**DNA PROCESSING REQUIRED 10 U.S.C. §1565**

This record is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.31), Office of the Judge Advocate General, Washington Navy Yard, 1014 N Street, S.E., Suite 401, Washington Navy Yard, DC 20374-5047 for review under Article 69a, UCMJ.

The results of the foregoing case are hereby approved, and promulgated in accordance with R.C.M. 1114, MCM (2008 Ed.)



M. S. BOENSEL  
Rear Admiral, U.S. Navy  
Commander, Navy Region, Mid-  
Atlantic

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# NO PORT IN A STORM – A REVIEW OF RECENT HISTORY AND LEGAL CONCEPTS RESULTING IN THE EXTINCTION OF PORTS OF REFUGE

Lieutenant Lena E. Whitehead, JAGC, USN\*

## I. PORTS OF REFUGE – THE DISAPPEARANCE OF A MARITIME CUSTOM

Mariners of the high seas make themselves aware of all available ports that may be utilized in the event of a mishap at sea. Indeed, any responsible captain knows finding a port of refuge can be the difference between the life and death of his ship and crew in the face of foul weather or a structural or mechanical failure. In recent years however, the availability of these safe havens has become less certain as the legal definitions of generations-old terms like “Port or Place of Refuge” and “Safe Harbor” have become more tenuous.

“Refuge” is defined as: 1) shelter or protection from danger or distress; 2) a place that provides shelter or protection, or 3) something to which one has recourse in difficulty.<sup>1</sup> These definitions align perfectly with what was, for centuries, described by mariners, and commonly accepted, as a “port of refuge.”<sup>2</sup> It was, therefore, commonly understood through natural law that when a vessel was in distress or condition of *force majeure*<sup>3</sup> she could turn to the closest harbor and seek refuge.<sup>4</sup> However, this is no longer a universally accepted premise, much to the detriment of modern seafarers.

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<sup>1</sup> Webster’s Ninth New Collegiate Dictionary 990 (1986).

<sup>2</sup> BIMCO, *Why are Ports of Refuge Such a Problem?*, Feb. 9, 2002, [https://www.bimco.org/Corporate%20Area/Education/Seascapes/Questions\\_of\\_shipping/Why\\_are\\_ports\\_of\\_refuge\\_such\\_a%20\\_problem.aspx](https://www.bimco.org/Corporate%20Area/Education/Seascapes/Questions_of_shipping/Why_are_ports_of_refuge_such_a%20_problem.aspx).

<sup>3</sup> Force Majeure: “An event or effect that can be neither anticipated nor controlled; the term includes both acts of nature (such as floods and hurricanes), and acts of people (such as riots, strikes, and wars), Cf., ACT OF GOD.” Black’s Law Dictionary 263 (pocket ed. 1996). See also Practical Shipping Vocabulary, <http://www.infomarine.gr/cgi-bin/insearchdictionary.pl> (last visited Jul. 7, 2009).

<sup>4</sup> *Why are Ports of Refuge Such a Problem?*, *supra* note 2.

## II. PORTS OF REFUGE – A LOOK AT THE PAST

The days when a vessel could turn to the nearest port in time of distress began to wane in the late twentieth century<sup>5</sup> as needy vessels in distress were turned away with growing frequency, sometimes resulting in catastrophic consequences.<sup>6</sup> The reasons varied. In some instances, and as ships grew in size, ports began to lack the facilities to harbor and provide for them. Ships in danger of spilling oil or other hazardous substances were shunned in the interest of protecting the coastal state.<sup>7</sup> In other cases, national security and political considerations gave rise to the denial of entry of foreign vessels. The paradigm shift was not based on the fact that these vessels were less deserving of assistance than vessels in generations past, but rather on the fact that distressed vessels came to be viewed by coastal states as “maritime pariahs”<sup>8</sup> or as a potential threat to port and national security.

Ironically, refusal to provide a port of refuge can ultimately harm the denying state as much as the failing vessel itself might have. For example, consider the case in which an oil-carrying vessel in trouble seeks shelter.<sup>9</sup> The vessel, upon sending a distress call, or asking for permission to enter a port, is directed to set sail as far away from the port as possible. The port of the coastal state refuses to grant refuge believing this to be the best response to ensure the protection of its environment, which is threatened by the leaking vessel. The handicapped vessel then proceeds (or is towed against its wishes) to the high seas, where the vessel’s weakened state is further assaulted with the strength of the ocean. Not surprisingly, the vessel reaches its demise and upon ultimately sinking, breaks apart and releases her hazardous cargo into the water. The hazardous cargo then washes onto the coastline of the very state that initially refused the vessel.

The problem at hand is as obvious as the validity of the competing interests. Vessels occasionally require a port of refuge and coastal states need to protect themselves against environmental hazards and security threats. The

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<sup>5</sup> See *id.*

<sup>6</sup> The turning away and sinking of the *Erika* off the coast of France in 1999 resulted in 10,000 tons of crude oil being spilled along the French coast. Similarly, the *Castor* spent 40 days cruising around the Mediterranean in 2000 in search of a port of refuge, operating with a twenty-six meter crack across the main deck. The *Castor* luckily was able to eventually moor off the coast of Tunisia and safely offload 29,500 tons of gasoline. Christopher F. Murray, *Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the Erika and the Castor*, 63 OHIO ST. L. J. 1465, 1469-71 (2002).

<sup>7</sup> *Why are Ports of Refuge Such a Problem?*, supra note 2.

<sup>8</sup> Prof. Hilton Staniland, Deputy Vice-Chancellor, University of Kwa-Zulu Natal, South Africa, Lecture at the short course “The Law of the Sea” at Tulane Law School (Spring 2004).

<sup>9</sup> This example originates from a real incident involving the sinking of the *Prestige* off the coast of Spain in 2001. See *infra* Section IV.B.

turning away of a distressed vessel can often result in failing to protect the interests of either party.

### III. CONTROLLING LAW

A significant source of the confusion pertaining to ports of refuge is the lack of a governing body lawfully encapsulating the topic. Existing conventions cover vessels operating in the territorial waters of a foreign state, and address a coastal state's obligation to protect the marine environment when such a vessel is seeking assistance. This paper addresses those conventions which have been ratified by the majority of states or which contain provisions recognized as customary international law.

#### A. Right to Innocent Passage

Under Article 18 of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>10</sup> all vessels enjoy a right of innocent passage through the territorial sea<sup>11</sup> of a foreign state.<sup>12</sup> A right of entry to a port of refuge can be found at Article 18:

(2) Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation *or are rendered necessary by force majeure or distress* or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress (emphasis added).<sup>13</sup>

Although a right of entry may be implied from the text of Article 18, Article 19 can also be read to support the right to refuse entry to vessels, as it provides examples of what is *not* considered innocent passage.<sup>14</sup> For example, subsection (h) of Article 19 provides that passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in "any act of wilful and serious pollution contrary to this Convention."<sup>15</sup> Article 19 reinforces the broadly held

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<sup>10</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>11</sup> Under Article 3 of UNCLOS, "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles ...." *Id.*

<sup>12</sup> *Id.* at art. 18.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at art. 19.

<sup>15</sup> UNCLOS, *supra* note 10, at art. 19.

international custom that passage is not innocent if it threatens national security in any way.<sup>16</sup>

Article 21 of the Convention lends additional support to the proposition that a coastal state may turn away a distressed vessel for environmental concerns. In particular, Article 21 explains how a coastal state may adopt laws and regulations pertaining to the “preservation of the environment of the coastal State and the prevention, reduction and control of the pollution thereof.”<sup>17</sup> Each state is further empowered to do so in Article 192, where states are told they have, “the obligation to protect and preserve the marine environment.”<sup>18</sup> Article 221 goes so far as to allow the coastal state to take “proportional” measures *outside and beyond* the territorial sea to in order to protect itself from damage to the coastline or related interests stemming from pollution or possible pollution following a casualty at sea.<sup>19</sup>

Taking the articles together, one possible implication is that a distressed ship may, under certain circumstances, be denied safe harbor notwithstanding the innocent nature of her predicament. A coastal State may try to adopt a law or regulation denying access to ships that pose environmental hazards.<sup>20</sup>

### B. Duty to Render Assistance

The duty of a ship’s captain to render assistance while at sea is one of the oldest and most deeply rooted traditions of admiralty.<sup>21</sup> In 1880, the British Admiralty court in *Scaramanga & Co. v. Stamp*<sup>22</sup> observed, “To All who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential consideration which may result to a ship or cargo from the rendering of the needed aid.”<sup>23</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at art. 21(f).

<sup>18</sup> *Id.* at art 21.

<sup>19</sup> *Id.* at art. 221.

<sup>20</sup> Coastal states can prevent vessels from entering ports; they are not even confined to refusing ships in trouble. Under UNCLOS coastal states *may* prevent ships of other countries from entering for safety of maritime traffic or preservation of pollution. Ports could simply declare “no single hulls are allowed to enter,” and support the regulation by stating that the decision is for preservation of the environment. If a vessel is refused by a port it is left up to the flag state of the denied vessel to declare that the coastal state breached the Law of Sea Convention.

<sup>21</sup> Frederick J. Kenney, Jr. and Vasilios Tasikas, *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 PAC. RIM. L. & POL’Y. J. 142, 148 (2003).

<sup>22</sup> *Scaramanga & Co. v. Stamp*, 5 C.P.D. 295, 304 (1880).

<sup>23</sup> *See id.*

Just as it is a duty enshrined to mariners, it is likewise the duty of every flag state to ensure the masters of ships flying their flag render assistance to vessels in distress.<sup>24</sup> This tenet is codified in the International Convention on Salvage,<sup>25</sup> wherein every master is bound to render assistance to “any person in danger of being lost at sea.”<sup>26</sup> This duty to save *life* at sea is also reflected in the International Convention for the Safety of Life At Sea (SOLAS).<sup>27</sup> The codification of a duty to render assistance appears to specifically isolate the saving of life from the saving of the vessel herself, as there is nothing in either convention mandating the port or coastal state to allow entry to a vessel in distress merely for the purposes of saving the ship or her cargo.

Further, the duty to render assistance does not override the coastal state’s right to protect itself from pollution or other threats. As stated earlier, Article 221 of UNCLOS provides for the coastal state to take measures, albeit proportional, outside of its territorial seas to prevent pollution following a casualty at sea.<sup>28</sup> This rationale is exhibited again in Article 9 of the International Convention on Salvage, which states:

Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognizable principles of the international law to protect its coastline or related interests from pollution *or the threat of pollution* following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions on relation to salvage operations (emphasis added).<sup>29</sup>

Thus, under the conventions, there is nothing to require a coastal State to render assistance to a ship when an environmental concern exists. Perhaps the lack of discussion regarding the compromise of life may be attributed to

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<sup>24</sup> UNCLOS, *supra* note 10, at art. 98(1).

<sup>25</sup> International Convention on Salvage, Apr. 28, 1989, 1989 U.S.T. LEXIS 229 [hereinafter Salvage Convention].

<sup>26</sup> Salvage Convention, *supra* note 24, at art. 10(1).

<sup>27</sup> International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1974 U.S.T. LEXIS 288.

<sup>28</sup> UNCLOS, *supra* note 10, at art. 221.

<sup>29</sup> Salvage Convention, *supra* note 24, at art. 9.

advances in modern aviation, which typically has allowed for crew members of a distressed vessel to be rescued by airlift while the vessel may be left to sink.<sup>30</sup>

### C. Duty to Protect the Marine Environment

While the ability of vessels to access “any port in a storm” is a romantic notion, protection of the marine environment is not mere subterfuge used by coastal states seeking to deny entry to a foreign vessel. Indeed, many articles in the United Nations Convention on the Law of the Sea specifically provide for protection to the marine environment. Article 192, for example, provides that “States have the *obligation* to protect and preserve the marine environment”<sup>31</sup> (emphasis added). More emphatically, Article 194 requires that “States *shall* take...measures...to prevent, reduce and control pollution of the marine environment from any source...”<sup>32</sup> (emphasis added). The measures envisioned by these articles are not specified. In practice, it may be argued that occasionally the measures taken by affected coastal states have proven extreme.

Subsequent to the 1967 sinking of *Torrey Canyon*<sup>33</sup> off the Isles of Scilly, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was enacted in 1969.<sup>34</sup> Under Article 1 of the 1969 Convention, parties:

May take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.<sup>35</sup>

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<sup>30</sup> This was done in the incidents of both the *Erika* (sinking off the coast of France in 1999) and the *Prestige* (sinking off the coast of Spain in 2001).

<sup>31</sup> UNCLOS, *supra* note 10, at art. 192.

<sup>32</sup> *Id.* at art. 194. *See also id.* at art. 211.

<sup>33</sup> *Torrey Canyon* was “a tanker which grounded off the coast of England on March 18, 1967, and eventually broke up and sank after being bombed and burned by aircraft of the Royal Air Force. The TORREY CANYON’s cargo, 119,328 tons of crude oil, was discharged into the Atlantic Ocean and substantial amounts found their way to the beaches on both sides of the English Channel.” *In re Barracuda Tanker Corp.*, 409 F.3d 1013 (2d Cir. 1969).

<sup>34</sup> International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, 1969 U.S.T. LEXIS 86.

<sup>35</sup> *Id.* at art. 1.

The magnitude of this convention is far reaching; it established as international law the rights of coastal states to take such very broad measures on the high seas to protect their coastline. It would seem to many that even the extreme measure of bombing a vessel posing a threat to the coastal state was now internationally approved.

Various international conventions on point overlap and interweave, but none provides an answer to the lingering port of refuge problem. A vessel in distress continues to require a place of refuge, but under current law might not be granted access to one. It may be argued that the coastal state may use its discretion when environmental concerns are involved. A needy vessel carrying environmentally hazardous cargo may be towed out to sea, left to spill its cargo, only to have the cargo (e.g. oil) wash onto the shores of the coastal state. Alternatively, the needy vessel may be allowed access to the port, only to spill its cargo in port at the coastline, creating an even more severe environmental problem for the coastal state.

Of concern, though, remains the distressed vessel that does not pose an environmental hazard, which seemingly still may be turned away from an available port of refuge and left to fend for herself on the high seas. While current law does not provide definitive direction, it appears to be drifting away from tradition.

#### **IV. GOING, GOING, GONE - THREE EVENTS DEMONSTRATING A DEPARTURE FROM TRADITION**

Ports of refuge and what will happen with them in the future has been a topic on the tongues of many for the past decade – but three particular events have provoked strident changes: the terrorist attack on the United States on September 11, 2001; the sinking of *Prestige* off the coast of Spain in November of 2001; and China's 2007 denial of entry to American vessels at the Port of Hong Kong. The policies developed in the aftermath of these events, crafted by the United States and the European Union, have resulted in decisions having both practical and legal implications as widespread as the oceans that separate them.

## A. September 11, 2001: Terrorist Attack on the United States

### 1. The Event

On September 11, 2001, the United States was attacked by the terrorist organization Al Qaeda.<sup>36</sup> The terrorist group, organized by Osama bin Laden, successfully hijacked four commercial airplanes.<sup>37</sup> Two of the airplanes were flown into New York City's World Trade Towers, causing their structural failure and ultimate collapse.<sup>38</sup> A third airplane was flown into the Pentagon, causing significant damage to the southeastern side of the building.<sup>39</sup> The fourth airplane crashed into a Pennsylvania field after heroic intervention by several passengers.<sup>40</sup> Collectively, the four incidents killed nearly 3,000 people, halted trading on the New York Stock Exchange, and closed industry around the country.<sup>41</sup> This large and public breach of national security had many effects on the country, the most immediate being the whisking of the United States into a new age of sharply tightened homeland security.

### 2. Effect on Port Security

While all access points in America received exacting study following the attacks on 9/11, port security was scrutinized in particular. An estimated 361 major ports of the United States handle 95% of overseas trade and 100% of foreign oil imported into the U.S., functioning as a major life line for the U.S.<sup>42</sup> Consequently, access became more restrictive immediately following the attacks as the United States became much less willing to accept foreign vessels into port.

Following the 9/11 attacks on the United States, the Coast Guard issued a rule extending a notification requirement for vessels entering a United States

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<sup>36</sup> See, e.g., Yale Law School, The Avalon Project, *September 11, Attack on America*, [http://avalon.law.yale.edu/subject\\_menus/sept\\_11.asp](http://avalon.law.yale.edu/subject_menus/sept_11.asp) (last visited Jul. 7, 2009); Wikipedia, the Free Encyclopedia, *September 11 Attacks*, [http://en.wikipedia.org/wiki/September\\_11,\\_2001\\_attacks](http://en.wikipedia.org/wiki/September_11,_2001_attacks) (last visited Jul. 7, 2009).

<sup>37</sup> See Yale Law School, The Avalon Project, *September 11, Attack on America*, [http://avalon.law.yale.edu/subject\\_menus/sept\\_11.asp](http://avalon.law.yale.edu/subject_menus/sept_11.asp) (last visited Jul. 7, 2009).

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* See also Feature, *9/11 by the Numbers*, N.Y. MAGAZINE, Sep. 8, 2002.

<sup>42</sup> *Maritime Port Security Overview*, <http://www.whisprwave.com/port-security-overview.htm> (last visited Jul. 7, 2009).

port from 24 to 96 hours.<sup>43</sup> The Coast Guard also redefined “dangerous cargo” by adding “products the Coast Guard believes to pose an undue risk to the public if hijacked or subjected to intentional damage.”<sup>44</sup> Restrictions were enhanced further when the required notice of arrival for vessels carrying dangerous cargo was also increased from four to twelve hours.<sup>45</sup>

Although security has been loosened slightly since the immediate aftermath of 9/11, the tightened security has by no means been relaxed.<sup>46</sup> In the years following 9/11, supporters of increased security measures continued to push for additional port security.<sup>47</sup> As such, the current trend in the United States discourages unscheduled visits of vessels to its ports.

### **3. Right of Entry/Right of Refusal**

Current law governs the area around a potential port of refuge as well as the port itself. It has been argued that the Convention on the Territorial Sea and the Contiguous Zone of 1958 (CTSCZ) guarantees a vessel’s right of entry. Article 15 of the CTSCZ reads: “The coastal State must not hamper innocent passage through the territorial sea.”<sup>48</sup> However, in Article 16, the CTSCZ allows a coastal state to temporarily suspend the right of innocent passage in its territorial waters when it is “essential for the protection of its security.”<sup>49</sup> UNCLOS further specifies this concept at Article 19(2), stating for “passage of a foreign ship shall be considered to be prejudicial [and thus neither innocent, nor mandated] to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities...”<sup>50</sup> This language

<sup>43</sup> Press Release, American Association of Port Authorities, Five Years After 9/11 Attacks: U.S. Ports More Secure Than Ever; Progress Must Continue (Sep. 1, 2006) (*available at* <http://www.apa-ports.org/Press/PRdetail.cfm?itemnumber=1092>).

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> U.S. ports currently require 96 hours’ notice for a vessel carrying dangerous cargo to enter. If the vessel has more than one stop planned, it must give notice of each intended stop prior to the first port call. *See Navigation and Navigable Waters*, 33 C.F.R. § 160.T204 (2009).

<sup>47</sup> *Reichert Announces over \$14 Million for Port Security*, Congressman Dave Reichert, Sep. 25, 2006,

<http://reichert.house.gov/News/DocumentSingle.aspx?DocumentID=84263>.

<sup>48</sup> Convention on the Territorial Sea and the Contiguous Zone, Sep. 10, 1964, 15 U.S.T 1606, 516 U.N.T.S. 205, at art. 15.

<sup>49</sup> *See id.* at art. 16(3).

<sup>50</sup> UNCLOS, *supra* note 10, at art. 19(2). The activities included are

- (a)any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defense or security of the coastal State;
- (e) the launching, landing or taking on board of

points to the inevitable conclusion that the right of refusal applicable to ships seeking entry to a coastal nation's ports applies also to entry into the territorial seas of that coastal nation, albeit only where it is considered necessary for the peace or security of the coastal State.

Typically, a right of entry is granted for humanitarian purposes. The CTSCZ does not specifically address environmental concerns. However, it is generally accepted that a humanitarian right of entry is not meant to protect shippers or commercial interests.

In the case of right of entry for the protection of human life, the United States follows the international norms applicable to rescuing life at sea. However, this still does not guarantee an open port. The United States, upon saving persons at sea, must determine whether they are U.S. citizens or not. Non-U.S. citizens are delivered back to their home country or in some cases to a neutral country that is closer.<sup>51</sup>

#### 4. United States in the Future

As mentioned previously, the United States does not have an “open arms” policy for unscheduled visits by vessels in distress. In the event that a vessel is in distress, whether stateless, flying a flag of convenience, or registered to a flag state of questionable relations with the United States, it may be refused the right of entry for security concerns. Similarly, if a vessel recently made port in a country with which that the United States has poor relations, security measures may preclude acceptance of the vessel into a national port. The consequences applicable to a vessel in distress from a friendly nation are unknown.

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any aircraft; (f) the launching, landing or taking on board of any military device; (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (h) any act of willful and serious pollution contrary to this Convention; (i) any fishing activities; (j) the carrying out of research or survey activities; (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (l) any other activity not having a direct bearing on passage.

*Id.*

<sup>51</sup> 8 U.S.C.S. § 1225(a)(1) (LexisNexis 2009) (a person picked up on the high seas or in U.S. territorial seas is not deemed to have “arrived” in the United States for immigration purposes).

## B. *Prestige*

### 1. The Event

The United States has been lucky in that the last major oil spill affecting its coast line was *Exxon Valdez* in 1989.<sup>52</sup> This spill, though catastrophic, occurred off the coast of Alaska – away from any human life – but still affects the ecosystem decades later.<sup>53</sup> In spite of the spilling of over 11 million gallons of crude oil, *Exxon Valdez* does not even rank within the top ten largest oil spills worldwide.<sup>54</sup>

The European Union has been less fortunate, suffering three major incidents within the last decade. *Erika*'s oil spill washed 14,000 tons of heavy fuel oil along the coast of France in 1999.<sup>55</sup> *Castor*, though able to eventually off-load her oil, maneuvered around the Mediterranean with a cracked hull for 40 days, threatening the various coastal states with the possibility of an oil spill.<sup>56</sup> In 2001, after transmitting a distress call, *Prestige* sank off the coast of Spain after being denied entry into local ports.<sup>57</sup> Instead, the vessel was towed to the high seas where she broke in half and sank,<sup>58</sup> blanketing the coast of Spain with 77,000 tons of heavy fuel oil.<sup>59</sup>

### 2. Not in my Backyard

The sinking of *Prestige* is a classic example of not only the “not in my backyard” doctrine, but also the resulting worst case scenario of environmental damage to the coastal state. *Prestige*, a vessel in distress that clearly would have benefited from aid and repairs, was denied entry into a port of refuge by Spain. It is easy to tout the responsibility of aiding environmentally unsound vessels

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<sup>52</sup> The Mariner Group Oil Spill History, <http://www.marinergroup.com/oil-spill-history.htm> (last visited Jul. 7, 2009).

<sup>53</sup> Jennifer Horton, *What is the Worst Environmental Disaster in History?*, How Stuff Works, Apr. 21, 2008, <http://science.howstuffworks.com/environmental-disaster.htm>.

<sup>54</sup> See id.

<sup>55</sup> Murray, *supra* note 6, at 1469-71. See also The Erika Oil Spill – Using the Incident to Positive Effect (Mar. 9, 2000), <http://www.marinelink.com/Story/The+Erika+oil+spill+-+using+the+incident+to+positive+effect-2915.html>.

<sup>56</sup> See Murray, *supra* note 6, at 1469-71.

<sup>57</sup> Crippled Fuel Oil Tanker Sinks, CNN.com (Nov. 20, 2002), <http://archives.cnn.com/2002/WORLD/europe/11/19/spain.oil/>.

<sup>58</sup> See id.

<sup>59</sup> Maria Jose Caballero, *The Prestige Disaster One Year On*, Greenpeace, Nov. 2003, [http://www.greenpeace.org/multimedia/download/1/346545/0/Prestige\\_report.pdf](http://www.greenpeace.org/multimedia/download/1/346545/0/Prestige_report.pdf).

before they break apart, yet Spain did not want to help *Prestige* when it was in Spain's backyard.

Ironically, it was the Spanish delegation at the International Maritime Organization (IMO)<sup>60</sup> meeting in January 2001 (shortly after the *Castor* incident, but months before the *Prestige* sank) that endorsed a call for action concerning ports of refuge and establishing sheltered waters.<sup>61</sup> When presented with the threat of a possible oil spill from *Prestige*, the national interest in avoiding a potential environmental disaster overshadowed any willingness to accept the vessel into port. The Spanish government desired *Prestige* to be as far from the Spanish coast as possible. By diverting *Prestige* into rougher waters, rather than inviting her into port for repairs, the Spanish government brought about the very environmental hazard that it sought to avoid.

A technical analysis following the incident stated that:

Had the vessel been afforded a safe refuge, protected from the wave bending moments and dynamic forces experienced in the open ocean, [Prestige] would have remained intact and afloat for a sustained period, certainly long enough to lighter the oil cargo off the vessel and prepare it for subsequent repair.<sup>62</sup>

Perhaps if Spain had given way to tradition and granted a port of refuge, this catastrophe might have been avoided. Here, modern exceptions consumed tradition and neither competing interest won.

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<sup>60</sup> The International Maritime Organization (IMO) was created by the International Convention for the Safety of Life at Sea (SOLAS), *see supra* note 26, and adopted in Geneva in 1948. The purpose of the IMO is to "develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping." International Maritime Organization, <http://www.imo.org> (last visited Jul. 7, 2009).

<sup>61</sup> International Maritime Organization, "Places of refuge" – Addressing the Problem of Providing Places of Refuge to Vessels in Distress, [http://www.imo.org/home.asp?topic\\_id=746](http://www.imo.org/home.asp?topic_id=746) (last visited Jul. 7, 2009).

<sup>62</sup> Press Release, ABS Releases Report on "Technical Analyses Related to the Prestige Casualty," Calls for International Guidelines on Places of Refuge (March 4, 2003), <http://www.eagle.org/eagleExternalPortalWEB>ShowProperty/BEA%20Repository/News%20&%20Events/Press%20Releases/2003/March4,2003>.

### **3. Europe's Cooperative Movement**

In the aftermath of *Prestige* the European Union (EU) pushed for a cooperative movement to solve the obvious port of refuge problem. Given the clear environmental dangers, the EU sought to avoid sending more distressed vessels to the high seas, only to break up and spill their potentially hazardous cargo all over the European shoreline.

#### **a. EU Directive 2002/59/EC**

One step the EU took was in the form of a Directive from the European Parliament and the Council. Issued on June 27, 2002, the Monitoring Directive requires that EU member states create plans whereby ships in distress may, if the situation requires, be given refuge in their ports or any other sheltered area in the best conditions possible.<sup>63</sup> Directive 2002/59/EC is more motivational than instructional, however, as it does not direct specific action plans.

The European Commission seemed to recognize the economic deterrent to a coastal State that exists when a member state considers inviting a potential environmental disaster into one of its ports. The European Commission expressed in a generic sense the need to provide prompt compensation to any accommodating port. Again, being more motivational than instructional, the Directive does not specify a specific funding mechanism. What may be gleaned from the Monitoring Directive is a concern by the EU for the seemingly dwindling tradition of ports of refuge and a definitive effort to provide incentives to discourage further departure from the once guaranteed custom.

#### **b. International Maritime Organization Guidelines**

Following the sinking of *Prestige*, the International Maritime Organization (IMO) issued a series of guidelines regarding places of refuge for ships in need of assistance. These guidelines were adopted at the 23rd Assembly in 2003<sup>64</sup> and are intended to be used when a ship is in distress, without emergent threat to human life.<sup>65</sup>

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<sup>63</sup> See Council Directive 2002/59/EC of Jun. 27, 2002, art. 19-20.

<sup>64</sup> Guidelines on Places of Refuge for Ships in Need of Assistance, IMO Res. A.949(23) (Dec. 5, 2003).

<sup>65</sup> See *id.*

The guidelines explain:

1.2 The issue of places of refuge is not a purely theoretical or doctrinal debate but the solution to a practical problem: What to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved. Should the ship be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?

1.3 When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge.

1.4 However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

1.5 While coastal States may be reluctant to accept damaged or disabled ships into their area of responsibility due primarily to the potential for environmental damage, in fact it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions.

1.6 In some circumstances, the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel's condition deteriorating or the sea, weather or

environmental situation changing and thereby becoming a greater potential hazard.

1.7 Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast.<sup>66</sup>

Although the IMO has, at best, taken steps toward planning protocols for ports of refuge, and has, at least, drawn attention to the importance of doing so, the practical result is that there are still no specific rules, firm guidance or directions. Coastal States remain in the same position they were in prior to the IMO guidelines: when an incident arises, the coastal State must decide what to do on a case-by-case basis, weighing the politics of the situation and any potential threats posed to the environment.

### c. Pre-Designated Ports

One possible solution to the ports of refuge dilemma would be for coastal nations to designate specific ports as ports of refuge.<sup>67</sup> If there were designated ports of refuge, for example, money could be funneled directly to those ports to stabilize their infrastructure with applicable facilities and also to provide compensation for damages sustained by aiding failing vessels. This has not been implemented, however, because it is not a perfect solution.

Often when a vessel is in distress it needs access to the closest port, not a port “designated” to assist it. What if the designated port is not nearby the failing ship? Also, how would these designated ports be chosen? Some states have more coastline than others. Would these states have more designated ports than others? And if so, would it be fair that their risk is so much higher? These questions are among many that remain unanswered.

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<sup>66</sup> *Id.*

<sup>67</sup> Murray, *supra* note 6, at 1469-71.

### C. China's 2007 Denial of American Vessels in Distress

#### 1. The Event

On November 20, 2007, two United States Navy minesweepers, the USS *Patriot* and USS *Guardian*, were denied emergency requests to dock in Hong Kong and refuel.<sup>68</sup> The two vessels made their request when a Pacific storm unexpectedly descended upon them during a routine patrol mission in the South China Sea.<sup>69</sup> At the time of the request both vessels were running low on fuel.<sup>70</sup> Nonetheless, Chinese authorities denied the emergency request, forcing both vessels to remain at sea.<sup>71</sup> Fortunately, both vessels weathered the storm safely.

#### 2. A Nautical Tradition Gives Way to Modern Politics

Various explanations have been offered to rationalize China's choice to ignore the longstanding maritime tradition of port of refuge. Some hypothesize that China was reacting in anger to the United States' arms sales with Taiwan.<sup>72</sup> Others note that Liu Jianchao, the Foreign Ministry spokesman in Beijing, indicated China was upset over a U.S. Congressional award given to the Dalai Lama.<sup>73</sup> Ultimately, Foreign Minister Yang Jeichi indicated that the denial was due to an unfortunate "misunderstanding."<sup>74</sup>

It should be noted that the denials of the U.S. ships were not attributed to either a security or an environmental threat, as had been the case in other instances of entry denials discussed above. The precise reason China elected to deny entry may never be revealed, but what is readily apparent, and most damaging, is that this event marked a departure from the maritime tradition of offering ports of refuge under the most traditional of conditions.

Chief of Naval Operations Admiral Gary Roughead, in discussing the situation, reflected, "As someone who has been going to sea all my life, if there is one tenet that we observe, it's when somebody is in need, you provide — and

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<sup>68</sup> Richard Komaiko, *China's Decision to Deny U.S. Ships from Port of Hong Kong*, Power And Interest News Report, Dec. 5, 2007, [http://www.pinr.com/report.php?ac=view\\_report&report\\_id=730&language\\_id=1](http://www.pinr.com/report.php?ac=view_report&report_id=730&language_id=1).

<sup>69</sup> See id.

<sup>70</sup> See id.

<sup>71</sup> See id.

<sup>72</sup> See id.

<sup>73</sup> Komaiko, *supra* note 68.

<sup>74</sup> David Lague, *China Explains Decision to Block Ships*, N.Y. TIMES, Nov. 30, 2007.

you sort it out later.”<sup>75</sup> Apparently, this once widely held tenet may be a tenet of the past – at least along the Chinese coastline.

#### V. VARIED PERSPECTIVES OF PARTIES OF INTEREST

There are various competing interests and stakeholders naturally operating at odds in any port of refuge discussion. With the introduction of each additional party of interest, the issue is further complicated. If a firm policy is ever going to be established, it is necessary to consider each of the competing interests and what is at stake from the perspective of each.

When a vessel in distress needs to enter a port for refuge, regardless of the reason, there are numerous interested parties, each with different motivation behind its decision-making processes. When collective groups and organizations come together to discuss the ports of refuge problem, the contrasting interests are heard, but the goal of a conclusive solution to the problem remains seemingly unattainable.

##### A. Vessel Owner

A primary stakeholder in any discussion on ports of refuge is the vessel owner, who wants to be allowed into port to make repairs. There are several motivating factors.

First, the owner doesn’t want to lose his ship or risk the life of his crew unnecessarily. Logic would dictate that there is a greater chance of a ship being repaired successfully in port as opposed to at sea. If for some reason the ship could not be repaired, there exists a viable possibility of salvaging the ship in port. Conversely, if the ship sank at sea, the cost to dredge the ship and raise it would likely exceed the ship’s salvage value.

Second, the owner seeks to avoid liability for any cargo on board. Often, the cargo being transported by the ship is worth more than the ship herself. This is the case particularly with regard to crude oil. If the ship owner lacks a defense to the incident or would otherwise be at fault for the loss of the ship and her cargo, the owner has a vested interest in reaching a port of refuge, if for no other reason than to safeguard the cargo.

Third, because most current environmental statutes approach strict liability against the owner of a vessel which spills her cargo, if the ship is in

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<sup>75</sup> Thom Shanker, *China’s Denial of Port Calls by U.S. Ships Worries Navy*, N.Y. TIMES, Nov. 28, 2007.

danger of spilling any hazardous substance, the owner will seek refuge as quickly as possible. For example, pursuant to the Oil Pollution Act (OPA), the responsible party is deemed to be the owner of the “vessel or facility from which oil discharged.”<sup>76</sup> Furthermore, the defenses to liability are difficult to assert. Under OPA §2703 the burden of proof is on the spilling party, and can only be overcome by a preponderance of the evidence.<sup>77</sup>

Various organizations comprised of shipping managers and owners have released statements on ports of refuge emphasizing their point of view and lending support to different organizations. The International Ship Manager Association (ISMA) supports following the IMO guidelines in an effort to develop plans for establishing and maintaining the tradition of ports of refuge.<sup>78</sup> ISMA also stresses that the safe haven needs to be the *closest* port to a vessel in distress.<sup>79</sup> This aligns ISMA with other organizations opposed to the concept of designated ports of refuge.

Also supporting the IMO guidelines and EU Directive is the International Association of Independent Tanker Owners (INTERTANKO).<sup>80</sup> INTERTANKO supports any movement interested in developing plans for ports of refuge.<sup>81</sup> INTERTANKO openly supports both the IMO guidelines and the EU directive.<sup>82</sup>

### B. Captain of the Ship

Another key stakeholder in any port of refuge discussion is the captain of the ship, who is motivated to protect the source of his livelihood. If the vessel he commands sinks, there are two pertinent outcomes. First, the captain may be deemed responsible for loss of the ship and her cargo. The captain, being in command, is responsible for seeing that the vessel is seaworthy. Second, if the vessel is lost, and even if the captain escapes the incident without legal liability, his reputation, career and livelihood may nonetheless suffer.

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<sup>76</sup> 33 U.S.C.S. § 2702 (LexisNexis 2009).

<sup>77</sup> 33 U.S.C.S. § 2703 (LexisNexis 2009).

<sup>78</sup> Laszlo Kovats, *Canadian Shipmasters' Conference in Halifax 22-23 Sept 2005*, Int'l Fed. of Shipmasters' Associations Newsletter No. 48, Dec. 2005, at 14-18.

<sup>79</sup> See *id.*

<sup>80</sup> This is sometimes interpreted to mean “independent,” not part of a conglomerate; these are often owners that have less money, and hence older ships. The last major spills have all been from single hull, older ships, in the 20+ years range.

<sup>81</sup> INTERTANKO position on Ports of Refuge,

<http://www.intertanko.com/pdf/weeklynews/placesofrefuge.pdf> (last visited Jul. 7, 2009).

<sup>82</sup> See *id.*

The captain is bound to obey the demands of the coastal state. If the state denies the vessel entry, the captain has no option but to turn the vessel about and seek an alternate port. Failing to obey the direction of the coastal state could result in being repelled by force, sanctions against the captain, and even possible detention of the vessel and cargo.

### C. Cargo Owner

When a vessel is in distress, the parties holding legal title to the cargo certainly hope the vessel finds and enters a port of refuge. The cargo owner does not want to lose the cargo, which is usually worth more than the vessel in which it is carried. In the case of standard cargo, the owner(s) of lost cargo must undertake the arduous process of requesting and obtaining reimbursement. If the vessel owner has a natural legal defense, (*e.g.* act of God, caught in hurricane) the cargo owners will only be able to attempt recovery through insurance claims. In the case of crude oil, or other hazardous substances, there exist additional incentives to reach a port of refuge. Owners of such cargo wish to avoid the rise in insurance coverage costs that inevitably follow every spill. They also wish to avoid political and economic pressure placed upon the buyers and sellers of spilled substances. These economic pressures (*e.g.* demands to give more to various liability schemes, taxes, etc.) often bring unwanted attention to those profiting within the industry.

### D. Coastal State Government

The government of a coastal state has a solitary and overarching motivation: preservation of the state. States must consider their national security. In the United States, for example, national security is a highly visible protective concern. When a vessel is nearing a U.S. coastline claiming to be in a state of emergency, the first response by the United States will be to assess the situation for a potential security threat. The assessment will include determinations regarding the validity of the distress claim, the possibility of terrorist activity, environmental contamination of a large port or river mouth, and the character of the cargo.

In the case of a potential environmental hazard, a government rightfully must consider the protection of marine life, coastal life, and profits and livelihood maintained by coastal businesses. The state must also consider the reaction of its citizenry. Any loss suffered by the state will likely affect the citizens on a more personal basis. For example, as a result of the *Prestige* incident, citizens of Galicia, Spain formed a movement entitled “Nunca Mais,” that is, “Never Again.” The group has demonstrated, protesting and demanding

compensation for damage to the coastline and advocating for reform of environmental standards.<sup>83</sup>

Governments may have an immediate reaction, based in self preservation and protection, to direct a ship as far away as possible, refusing it a port of refuge. Admittedly, there is little incentive for a coastal state to welcome a failing vessel into its territorial waters. Even if the vessel does not pose a security risk, it may pose a catastrophic environmental threat. It is difficult to anticipate whether a distressed vessel will pose a greater threat in port or off shore. Most countries, although supporting reform and the port of refuge concept, want to maintain their ability to refuse a vessel in distress.

#### **E. Ports in Coastal States**

Ports of coastal states shy away from the development of a bright-line rule rendering automatic refuge. Ports possess immediate concerns if a vessel in distress is granted access. Security of the port and the state remain issues if the port is an access point where national security can be breached. Often the ports themselves are responsible for maintaining that security. In the scenario of a potential spill of a hazardous substance, the port must consider where liability will fall if the vessel sinks or requires extensive efforts to avoid an environmental disaster. If a vessel is provided rescue service by the port, the port will be rightfully concerned with the source of reimbursement for expenses resulting from a rescue effort. When the idea of designated ports of refuge is raised, such ports need to be assured that there will be funding for any special renovations required in order to be so designated. In the wake of so many unanswered questions, the logical response from the port's perspective is to refuse the vessel.

The European Seaports Organization (ESPO) has formulated policy regarding a port's decision to "accept" a vessel in distress.<sup>84</sup> Use of the word "accept" in its policy demonstrates ESPO's belief that ports should have a choice to accept or refuse a ship. As discussed previously, the position of the ports is not aligned with the position of the ship owners. The priority of the port is protecting the port itself, as opposed to rescuing the ship or any cargo. The ship owner's concerns, alternatively, focus directly on the ship, the crew and the cargo.

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<sup>83</sup> Frontline/World, *Spain, the Lawless Sea*, Jan. 2004,  
<http://www.pbs.org/frontlineworld/stories/spain/>.

<sup>84</sup> European Sea Ports Organization Policy on Maritime Safety,  
[http://www.espo.be/Active\\_Policy\\_Issues/Maritime\\_Safety\\_.aspx#Places\\_of\\_Refuge](http://www.espo.be/Active_Policy_Issues/Maritime_Safety_.aspx#Places_of_Refuge) (last visited Jul. 7, 2009).

When addressing vessels in distress, the term “sheltered water” has been used.<sup>85</sup> This reference to “sheltered water” is in lieu of a port of refuge, and provides an opportunity for ports to argue that ships need not be allowed into port if anchoring elsewhere will accomplish the same purpose. ESPO expresses concern regarding where liability will fall if a vessel is allowed to enter port and disaster follows.<sup>86</sup>

ESPO never denies that a coastal state, or a specific port, has the option to refuse entry to a vessel in distress. ESPO welcomes the EU/IMO guidelines,<sup>87</sup> but like the coastal states, the ports often lack incentives to unconditionally allow any and all distressed vessels entry to their ports.

#### F. Insurers

Commercial insurers’ motivation on the issue of ports of refuge is fiscally based. When faced with a cracked hull and a potential hazardous cargo spill, an insurer will want to limit its monetary loss to the greatest extent possible. The insurers of the hull, as well as the insurers of the cargo,<sup>88</sup> want the vessel to obtain refuge as quickly as possible. A hull insurer does not want a vessel to sink because a vessel resting at the bottom of the ocean is a complete loss. If the vessel can be brought into port, it may be salvaged. A hull insurer may sell salvageable parts, thus mitigating its loss.

In the case of a cargo spill, the protection and indemnity (P&I) marine insurance carrier<sup>89</sup> desires a vessel to be allowed into a port of refuge, or at least

<sup>85</sup> *Places of Refuge for Ships in Need of Assistance Guidelines and Procedures: A Report Prepared Under the Project Euromed Cooperation on Maritime Safety and Prevention of Pollution from Ships*, at 37 (2005), [http://www.safemed-project.org/filebank/documents/task33O/task33o\\_sub\\_action\\_a\\_report.pdf](http://www.safemed-project.org/filebank/documents/task33O/task33o_sub_action_a_report.pdf) (last visited Jul. 7, 2009).

<sup>86</sup> European Sea Ports Organization Policy on Maritime Safety, [http://www.espo.be/Active\\_Policy\\_Issues/Maritime\\_Safety\\_.aspx](http://www.espo.be/Active_Policy_Issues/Maritime_Safety_.aspx) (last visited Jul. 7, 2009).

<sup>87</sup> *See id.*

<sup>88</sup> Often referred to as Protection and Indemnity Marine Insurance (P & I clubs).

<sup>89</sup> Most marine P&I insurance is provided through the media of mutual “clubs.” The thirteen principal underwriting member clubs of the International Group of P&I Clubs (“the Group”) between them provide liability cover (protection and indemnity) for approximately 90% of the world’s ocean-going tonnage. Each Group club is an independent, non-profit making mutual insurance association, providing cover for its shipowner and charterer members against third party liabilities relating to the use and operation of ships. Each club is controlled by its members through a board of directors or committee elected from the membership. Clubs cover a wide range of liabilities including personal injury to crew, passengers and others on board, cargo loss and damage, oil pollution, wreck removal and dock damage. Clubs also provide a wide range of services to their members on claims, legal issues and loss prevention, and often play a leading role in the management of casualties. See International Group of P&I Clubs, <http://www.igpandi.org/>, (last visited Jul. 7, 2009). See also Norman J. Ronneberg, *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. MAR. L.J. 1, 8-11 (1991).

towed to an area where any spillage of oil or hazardous substance can be minimized or successfully contained. The P&I marine insurance carrier wants to avoid a spill covering and destroying a coastline. Its concern is twofold: for the sake of the coastline itself, and for the possibility that the P&I insurer may be required to compensate all involved parties in the salvage on that operation.<sup>90</sup> It is predictable that insurers will support movements toward developing a protocol that will help guarantee the existence of ports of refuge.

### G. Environmentalists

The environmental debate has gained momentum in world politics. Environmentalist groups are vocal regarding the damage caused to the environment by cargo spills and the importance of preventing spills of any kind. Environmentalist groups' suggestions tend to focus more on the means by which hazardous cargo is transported. With environmental preservation and safety as their focus, environmentalists demonstrate support for any action that would prevent hazardous cargo from affecting the environment in any way. It is impossible to determine with certainty whether allowing a vessel in distress to come closer to a coastline, or even into port, will increase the likelihood of negative environmental impact on the coastal environment. Arguably, granting a distressed vessel entry to port will diminish the potential for environmental contamination. Various environmental committees and groups have been formed to discuss this issue at length with no consistent resolution.

The Agreement for Cooperation in Dealing With Pollution of the North Sea by Oil and Other Harmful Substances (the “Bonn Agreement”) is an example of a network of professionals, formed through an international agreement of the North Sea coastal states, to make an effort to combat pollution. The Bonn Agreement created a “rational approach for the designation and use of places of refuge.”<sup>91</sup> This rational approach included a list of criteria to be assessed when considering whether a distressed vessel will be granted access to a port.<sup>92</sup> The group went so far as to establish a checklist for the “responsible authority.” This checklist itemizes considerations of all types.<sup>93</sup> Overall, the Bonn Agreement supports neither accepting nor refusing an entering vessel, but rather provides a framework for consideration of a situation and assessing

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<sup>90</sup> Under Article 13 of the Salvage Convention, *supra* note 24, the hull insurer will pay the cost of salvage. But under Article 14, the P&I insurer will pay “Special Compensation” that goes beyond the costs covered by Article 13. *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

potential outcomes. Other commissions and groups have come up with similar responses.<sup>94</sup>

Greenpeace, in response to the rash of oil spills off the coast of Europe, calls for the implementation of “Particularly Sensitive Sea Areas” (PSSAs).<sup>95</sup> PSSAs protect sensitive coastlines by excluding ships deemed dangerous or by making pilotage compulsory.<sup>96</sup> The most recently adopted PSSAs, in 2005, included the previously international shipping lane Torres Strait.<sup>97</sup> Implementation of PSSAs has resulted in forcing some vessels to navigate around the areas. The result is that a port of refuge located within the relevant PSSA is not an option as the vessel is completely restricted from the area.

## H. Salvors

Salvors, like insurers, are motivated by profit. Salvors encourage the granting of access to ports of refuge, because it increases the likelihood that the salvor may earn a salvage award. Salvors operate under the concept of “no cure, no pay.”<sup>98</sup> If no opportunity to salvage a vessel exists, then consequently no pay for service exists either. Salvage in port is typically more successful, more certain, and requires less of an initial investment than salvage at sea.

The concern for salvors goes beyond the ease of profit-making. Salvors are looking at an uncertain future in the way of ports of refuge. Often, a primary legal concept of salvage is that it be voluntary. If ports *must* accept vessels, this may affect how salvage awards are decided. Ports may try to keep salvors on standby; this may alter how courts must define “salvage.” The IMO guidelines on places of refuge include a call for maritime authorities to make plans and analysis for possible assistance to ships.<sup>99</sup> This takes the salvage relationship, one that is traditionally personal between the salvor and ship owner, and brings in multiple third parties, changing the way salvage has traditionally worked. This paradigm shift will likely change the way profits are awarded and subsequently affect salvors’ decisions to involve themselves.

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<sup>94</sup> See Helsinki Commission – Baltic Marine Environment Protection Commission, <http://www.helcom.fi> (last visited Jul. 7, 2009).

<sup>95</sup> Caballero, *supra* note 59.

<sup>96</sup> *See id.*

<sup>97</sup> IMO Res. A.982(24) (Dec. 1, 2005).

<sup>98</sup> Geoffrey Q. C. Brice, *The Law of Salvage: A Time for Change? ‘No Cure-No pay’ No Good?*, 73 TUL. L. REV. 1831, 1832 (1999).

<sup>99</sup> *Guidelines on Places of Refuge for Ships in Need of Assistance*, *supra* note 62, at Section 3.

## VI. CONCLUSION

A sea of unanswered questions on ports of refuge exists. As outlined above, there are multiple competing interests involved. All of them stress the importance of ports of refuge as well as the urgency of the situation. States do not want their vessels refused by a port when they are in need, nor do they want an incident such as *Erika*, *Castor*, or *Prestige*, washing up on their shoreline. The reality is that a coastal state exercising control over a port of refuge will rarely be inclined to accept a failing vessel with today's myriad of political and environmental concerns. With no overarching legal scheme, the maritime world is left in a predicament where each port of refuge situation is decided on a case by case basis, leaving mariners and vessels in a dangerous state of uncertainty.

With every new example of a ship that is denied refuge, a paradigm shift becomes clearer: "ports of refuge" and the tradition of entering "any port in a storm" may soon be relegated to an obscure niche in history. When cooperation is not a priority to a coastal state or its ports, all ships must anticipate what they will need to survive in the worst possible conditions. They must create and implement a plan of action addressing what course is to be taken in the event of distress at sea. Each ship must assess what is most at stake, and be prepared to determine when that concern will take precedence over the commercial, political, or security based mission. The mission may always, never, or at a given point, take precedence over the ship, crew, or cargo. The issue of immediate importance does not lie in each entity's solution, but in the fact that the question must be answered at all. Distress at sea has always been, and will continue to be, of paramount concern to mariners. At the turn of the century, a lack of technology was often what prevented a ship reaching a port of refuge. Once again, ports of refuge are out of reach, not for lack of technology, but due to the lack of a coherent legal regime to adequately address the competing interests at stake. Until the many issues are addressed and resolved, mariners must be prepared to fend for themselves.

# **RESOLVING TOMORROW'S CONFLICTS TODAY: HOW NEW DEVELOPMENTS WITHIN THE U.N. SECURITY COUNCIL CAN BE USED TO COMBAT CYBERWARFARE**

**Toby L. Friesen\***

## **ABSTRACT**

Unfortunately, the law surrounding cyberwarfare has not developed nearly as quickly as the threat it now poses. This article identifies two challenges that restrict the development of a law to restrict acts of cyberwarfare. The first challenge is the complete confusion in what law, if any, should regulate cyberwarfare. The Law of Armed Conflict was designed to prevent kinetic attacks, not the destruction of information involved in cyberwarfare. Academics and practitioners are, therefore, divided on whether it is sufficient for restricting cyberwarfare, or if a new international agreement is warranted. Secondly, attributing a cyber attack to a State is so difficult that even if the law was clear, the application of blame, and therefore a penalty, might not be feasible. This comment proposes an international law to prevent cyberwarfare by drawing on new developments within the U.N. Security Council that expand its authority to protect international peace and security. Using Security Council Resolution 1373 (dealing with terrorist financing) as a basic framework for a new resolution to outlaw cyberwarfare, the problem regarding legal confusion would be automatically addressed. The second problem, related to attribution of cyber attacks, can be resolved by creating a U.N. subsidiary body to investigate claimed acts of cyberwarfare. This body could be modeled after the International Atomic Energy Agency, which requires in-State investigations of nuclear facilities. By authorizing similar investigations for alleged acts of cyberwarfare, effective attribution could be achieved.

Cyberspace has emerged as a warfighting domain not unlike land, sea, and air, and we are engaged in a less visible, but none-the-less critical battle against sophisticated cyberspace attacks . . . Our adversaries seek to operate from behind technical, legal, and

international screens as they execute their costly attacks.<sup>1</sup>

## I. INTRODUCTION

Conflicts between States are quietly, but dramatically, changing form. Throughout history, military conflicts have traditionally used soldiers, guns, bombs, and countless other means to impose physical destruction upon one's enemy. This is certainly still true today, but the focus of any major future conflict between States will be fundamentally different than those that have occurred previously. Militaries are becoming increasingly reliant on information to project strength,<sup>2</sup> and as information becomes central to conflict, computer networks become more tempting as targets. In the near future, the State that can dominate cyberspace will be able to likewise dominate its enemy without the cost in lives or the expense of a kinetic attack.<sup>3</sup> Cyber attacks are already becoming commonplace, not only because of their effectiveness in altering a battle, but because of the uncertainty over what the legal consequences of an attack are or should be.<sup>4</sup> This article discusses two areas that create

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<sup>1</sup> *Strategic Forces Programs in Review of the Defense Authorization Request for Fiscal Year 2008 and the Future Years Defense Program, Before the S. Comm. on Armed Services, Strategic Forces Subcomm.*, 110th Cong. 11-12 (2007) (statement of General James E. Cartwright, Commander, United States Strategic Command).

<sup>2</sup> Zalmay Khalilzad & John White, *Introduction to THE CHANGING ROLE OF INFORMATION WARFARE* 7 (Zalmay Khalilzad & John White eds., RAND, 1999) ("Militarily, as the Gulf War demonstrated, the United States is in a good position to exploit the advances in military technology, especially changes in information technology, due in great part to the high quality of its personnel and their training. The U.S. military has an unsurpassed ability to integrate complicated technical systems into pre-existing forces. This military technological prowess is backed up by a solid civilian technological base. The United States has made large investments in its national information infrastructure and has a well-established market for computers, software, and Internet services. Most other nations depend on our systems and technology.").

<sup>3</sup> See generally Edward Harshberger & David Ochmanek, *Information and Warfare: New Opportunities for U.S. Military Forces*, in *THE CHANGING ROLE OF INFORMATION WARFARE* 157-168 (Zalmay Khalilzad & John White eds., RAND 1999) (providing a description of the types of advantages advanced information systems can bring to military).

<sup>4</sup> See Lieutenant Colonel Richard W. Aldrich, *How do you Know you are at War in the Information Age?*, 22 HOUS. J. INT'L L. 223, 238 (2000); Commander Vida M. Antolin-Jenkins, *Defining the Parameters of Cyberwar Operations: Looking for Law in all the Wrong Places?*, 51 NAVAL L. REV. 132, 152-153 (2005); Stephen J. Cox, *Confronting Threats Through Unconventional Means: Offensive Information Warfare as a Covert Alternative to Preemptive War*, 42 HOUS. L. REV. 881, 899 (2005); Thomas C. Wingfield, *When is a Cyber Attack an "Armed Attack?"*: Legal Thresholds for Distinguishing Military Activities in Cyberspace 6 (Feb. 1, 2006) (recognizing the norm that "armed forces" is considered to have been designed to prevent kinetic attacks, but arguing for an

confusion regarding the legality of cyberwarfare, and proposes a framework that the United Nations (U.N.) could implement to effectively regulate and investigate acts of cyberwarfare.

States are regularly attacking each other through cyberspace,<sup>5</sup> yet no consensus exists on the legal ramifications of when one State attacks another's computer networks. In comparison, when an individual hacker breaks into a computer system, there is little doubt he is in violation of various domestic and international laws and can be prosecuted.<sup>6</sup> For example, a number of States have ratified the Council of Europe Convention on Cybercrime, which requires international cooperation in prosecuting hacking by individuals, and implementation of domestic laws to combat the various forms of cybercrime.<sup>7</sup> What is still not known, however, is what the ramifications are when a sovereign State attacks another State's computer systems or whether cyberwarfare is legally an act of war, espionage, or a criminal act. Without an answer to this question States will continue acting in an uncertain legal environment that leaves less timid States unconstrained to attack others with relatively few repercussions.

A resolution to the problem of cyberwarfare is twofold. First, due to the new nature of the problem, a legal consensus has yet to congeal on what constitutes an act of cyberwarfare that could trigger some form of retaliation. This problem lies in the terminology used to justify an act of war. Specifically, much of the problem originates in the U.N. Charter's definition of a "use of force."<sup>8</sup> Computer attacks do not use "force" as traditionally defined because there is no physical damage caused; thus many scholars have determined that a "use of force" does not apply to computer attacks.<sup>9</sup> The second problem faced is that even if there was a legal consensus on when a cyber attack violated international law, attributing cyberwarfare to a State actor is extremely difficult.<sup>10</sup> This is because not only do those responsible for the attack have to be ascertained, but a sufficient relationship between the individual and a State

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alteration of this norm to encompass possible cyber attacks) (available at <http://www.docstoc.com/docs/445063/when-is-a-cyberconflict-an-armed-conflict>).

<sup>5</sup> See discussion *infra* part II.B.

<sup>6</sup> See D. Jean Veta & Rochelle E. Rubin, *Network and Information Security: Domestic and International Initiatives to Combat Cybercrime*, Practicing Law Inst. Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series 711 PLI/Pat 955 (2002).

<sup>7</sup> Convention on Cybercrime, opened for signature Nov. 23, 2001, 41 I.L.M. 282.

<sup>8</sup> U.N. Charter art. 2, para. 4.

<sup>9</sup> See *supra* note 5.

<sup>10</sup> Doing so requires not only determining where an attack came from, and who was the person sending the attack, but then linking that person to a State. See generally Jeffrey Hunker, Bob Hutchinson, & Jonathan Margulies, Institute for Information Infrastructure Protection, White Paper, *Role and Challenges for Sufficient Cyber-Attack Attribution* (Jan. 2008), available at <http://www.thei3p.org/docs/publications/whitepaper-attribution.pdf>.

must exist to justify punishing that State. To locate the attacker and to link him to a State generally requires a physical investigation, which cannot be accomplished without authorization to enter a State's territory – an unlikely event because any State initiating a cyber attack is not likely to cooperate with an investigation without legal compulsion.

For these reasons, cyber attacks will continue until the international community clarifies the laws governing cyberwarfare and States agree to a framework allowing investigations of claims of cyber attacks. The most obvious form for imposing the rule of law on cyberwarfare would be a treaty, which in this case is unlikely to occur. This is because any State that is actively involved in anonymous cyberwarfare likely would not ratify a treaty to restrict a tool seen as an equalizing force against States with stronger conventional forces.<sup>11</sup> There then needs to be an agreement between States that defines what constitutes cyberwarfare, outlines its penalties, and provides for a neutral body that has jurisdiction to enter States to undertake investigations of alleged acts of cyberwarfare, all while circumventing the traditional treaty making process.

A recent development within the United Nations provides an opportunity to implement law that can outlaw cyberwarfare, while circumventing the challenges associated with treaty avoidance. Shortly after the terrorist attacks of 9/11, the U.N. Security Council passed Resolution 1373 which imposed on all States the responsibility of freezing funds associated with terrorist activity.<sup>12</sup> This Resolution has been seen as a dramatic expansion of the Security Council's powers,<sup>13</sup> from only imposing itself on a single State to, in this case, imposing itself on all States that are U.N. members. Imposing a similar resolution in relation to cyberwarfare could avoid the pitfalls associated with having a treaty widely ratified. Furthermore, implementing an international law for cyberwarfare through the Security Council could resolve issues related to attributing acts of cyberwarfare by incorporating language similar to that in the Nuclear Non-Proliferation Treaty (NPT), which allows for an investigative body to enter a State without its prior permission. Although the NPT has not worked seamlessly,<sup>14</sup> it has been an important step for delegitimizing nuclear proliferation, and a similar framework could play a role in combating cyberwarfare.

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<sup>11</sup> There are of course examples of States entering treaties that at first blush appear counter to their interests as they too limit States' access to weapons. These include the Nuclear Test Ban Treaty, the Chemical Weapons Convention, and the Biological Weapons Convention.

<sup>12</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>13</sup> See discussion *infra* part III.A.

<sup>14</sup> See S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (discussing Iran's unwillingness to cooperate with NPT investigators); Barbara Slavin, *North Korea Pulls Out of Non-Nuclear Treaty Today*, USA TODAY, Apr. 10, 2003, at p. 10A (in 2003 North Korea became the first State to withdraw from the NPT treaty).

After providing background on the issue of cyberwarfare, Part II of this article describes the two primary obstacles that have interfered with the creation of an international convention against cyberwarfare. Part III takes a close look at U.N. Security Council Resolution 1373, explaining how it has expanded the power of the Council to combat problems of global concerns, and then discusses challenges to implementing future legislation that might be perceived as overstepping the Council's authority. Part IV applies the framework used in Resolution 1373 to cyberwarfare, describing how a Security Council resolution could be used to overcome the legal confusion surrounding cyberwarfare, and resolve the attribution challenge by using the NPT as an example for creating a neutral investigative body that can fairly attribute a cyber attack. Part V concludes this article.

## **II. THE IMPEDIMENTS TO AN INTERNATIONAL LAW ON CYBERWARFARE**

Cyberwarfare is an impending problem that – because of its cross-border nature – can only be solved with an international agreement. Existing law that might seem applicable to cyberwarfare is inadequate because of the unique characteristics of cyberspace as a tool for warcraft. There are two important reasons why cyberwarfare does not fit neatly into the current international law structure. First, the laws regulating the initiation of armed conflict are inadequate in conflicts where the injury is non-kinetic.<sup>15</sup> Second, attributing an act of cyberwarfare to a State poses a difficult challenge and usually requires physical investigation, which many countries are likely unwilling to allow or pursue.<sup>16</sup> This section analyzes why these two challenges make the creation and implementation of an international law of cyberwarfare difficult.

### **A. Definitions**

A number of important terms need to be defined before turning to the problem of resolving inter-State attacks on computer systems. First, for the purpose of this discussion, “cyberspace” is the realm within which information operations take place.<sup>17</sup> “Cyberspace” is defined by the Air Force Cyber Command as “[a] domain characterized by the use of electronics and the electromagnetic spectrum to store, modify and exchange data via networked systems and associated physical infrastructures.”<sup>18</sup> This general definition

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<sup>15</sup> See *supra* note 5.

<sup>16</sup> See HUNKER ET AL., *supra* note 10.

<sup>17</sup> Some broad definitions of cyberwarfare include activities that do not necessarily take place within cyberspace. These activities are not the object of this paper.

<sup>18</sup> Air Force Cyber Command, *Cyberspace 101, Understanding the Cyberspace Domain*.

includes practically everything electronic – from computers, to the internet, to telecommunications systems.<sup>19</sup>

Within the realm of cyberspace, “information operations” are the actual attacks that cause harm and are synonymous with the commonly used term “cyber attacks.”<sup>20</sup> The Department of Defense defines information operations as “[t]he integrated employment of the core capabilities of Electronic Warfare, Computer Network Operations, Psychological Operations, Military Deception, and Operations Security, in concert with specified supporting and related capabilities, to influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own.”<sup>21</sup> This broad definition includes a number of terms that do not involve the actual attacks of computer systems.<sup>22</sup> The term “computer network operations,” however, refers specifically to computer attacks, and is defined as the operations to attack, defend, and exploit computers and computer networks.<sup>23</sup> This definition causes difficulty for the Law of Armed Conflict (LOAC). Computer network attacks typically do not injure persons or destroy property, but rather seek to alter decision-making, while the LOAC protects against unnecessary destruction and human injury.<sup>24</sup> Computer network operations are the primary focus of this article.

The term “cyberwarfare” is used in various forms. For the purposes of this article, it will describe any computer network attack undertaken by any State against another State. Furthermore, the only acts of cyberwarfare that will be discussed are those that occur outside of declared conflicts between States. This distinction is made because cyberwarfare during a conflict is simply another tool for conducting war. Outside of an open conflict, however, acts of cyberwarfare need clarification to determine what is and what is not legal. This definition of cyberwarfare distinguishes between an encroachment onto a computer system by an individual (cybercrime) or by a terrorist

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<sup>19</sup> <http://www.afcyber.af.mil/library/factsheets/factsheet.asp?id=10784> (last visited Aug. 1, 2009).

<sup>20</sup> *See id.*

<sup>21</sup> U. S. DEP’T OF DEFENSE, DIR O-3600.01, INFORMATION OPERATIONS at 1 (14 Aug. 2006), available at [http://www.fas.org/irp/doddir/dod/info\\_ops.pdf](http://www.fas.org/irp/doddir/dod/info_ops.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> The definition discusses military deception, electronic warfare, psychological operations, and operations security, all of which primarily involve a military function largely uncovered by this article.

<sup>24</sup> U. S. DEP’T OF DEFENSE, DIR. 3600.01, *supra* note 20, at 21.

<sup>25</sup> *See id.* at 2 (the definition of “information operations” does not explicitly claim to not harm persons. This can, however, be derived from its goal of only manipulating information. While the manipulation of information could theoretically lead to the harming of persons, this is certainly not the goal of information operations.).

(cyberterrorism)<sup>25</sup> from those made by a State (cyberwarfare). The ramifications of this point are significant. While cyber criminals<sup>26</sup> and cyber terrorists<sup>27</sup> can typically be prosecuted under domestic criminal laws, the consequences ought to be different for States attacking each other. For example, it stands to reason that if a soldier from country X entered a military base in country Y and destroyed a bank of computers necessary to the infrastructure of the State, the act may be considered an act of war that could allow defensive measures under Article 51 of the U.N. Charter.<sup>28</sup> This reasoning should be the same when one country breaks into the same bank of computers over cyberspace and destroys it through electronic means. To extend the LOAC to cyberwarfare would seem reasonable, but because of confusion within the law, this is not necessarily possible.

## B. Background

Recent examples of cyberwarfare help to illustrate the gravity of the problem. The most significant of these comes from the nation of Georgia, where cyber attacks began weeks before a single mortar was dropped in the recent conflict with Russia.<sup>29</sup> Various Georgian servers were overrun with distributed denial of service (DDOS) attacks, crippling websites<sup>30</sup> including the nation's foreign ministry website, forcing the government to communicate with the world through a blog and the Polish President's website.<sup>31</sup> The cyber attacks

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<sup>25</sup> One definition of cyberterrorism is, “unlawful attacks and threats of attack against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives.” The key distinction for differentiating cyberterrorists from cyber criminals is political or social motivations. *Terrorist Threats to the United States: Hearing Before the H. Special Oversight Panel on Terrorism, H. Comm. on Armed Services*, 105th Cong. (2000) (Statement of Dorothy E. Denning, Professor, Georgetown University).

<sup>26</sup> See generally Computer Frauds and Abuse Act, 18 U.S.C. § 1030 (1986) (this act was amended after the terrorist attacks of 9/11 to dramatically increase the criminal penalties for hacking); see also Convention on Cybercrime, *supra* note 7.

<sup>27</sup> See Tara Mythri Raghavan, *In Fear of Cyberterrorism: An Analysis of the Congressional Response*, 2003 U. ILL. J.L. TECH & POL'Y 297 (2003).

<sup>28</sup> See U.N. Charter art. 51 (outlining a State's ability to defend itself against “armed attack”).

<sup>29</sup> War, redefined; Even Before Russian Troops Arrived, Georgian Government Websites Were Under Cyber Attack, L.A.TIMES, Aug. 17, 2008, at Part A pg. 25.

<sup>30</sup> John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES, Aug. 13, 2008, at A1, available at <http://www.nytimes.com/2008/08/13/technology/13cyber.html> [hereinafter Markoff, *Before the Gunfire*]; see generally Mindi McDowell, UNITED STATES COMPUTER EMERGENCY READINESS TEAM, *United States Computer Emergency Readiness Team, Understanding Denial-of-Service Attacks* (Aug. 1, 2007), <http://www.us-cert.gov/cas/tips/ST04-015.html> (last visited Aug. 1, 2009). (In the realm of cyber attacks, DDOS attacks are a new and growing problem. They occur when an attacker, seeking to keep legitimate users from viewing a particular website, floods the particular site with requests for information from thousands of other computers which have been corrupted).

<sup>31</sup> John Markoff, *Georgia Takes a Beating in the Cyberwar With Russia*, N.Y. TIMES, Aug. 11, 2008, <http://bits.blogs.nytimes.com/2008/08/11/georgia-takes-a-beating-in-the-cyberwar-with-russia/> (last visited Aug. 1, 2009) [hereinafter Markoff, *Georgia Takes a Beating*].

targeted companies in the media, communications, and transportation industries,<sup>32</sup> attacked the presidential, parliamentary and central government's websites,<sup>33</sup> and defaced the national bank's website.<sup>34</sup> Russia denied involvement in the attacks, but there is reason to suspect that these were in fact State-sponsored rather than traditional hacker attacks.<sup>35</sup> Many of the attacks originated from computers controlled by the Russian Business Network, an organized crime group in Russia known to have connections with the government.<sup>36</sup> Furthermore, the cyber attacks began en masse not long before bombings began, making their timing very suspicious.<sup>37</sup>

Though the attacks against Georgia appear to be the first time that a cyber attack has corresponded with a physical invasion, it is certainly not the first time cyberwarfare has been used as a weapon.<sup>38</sup> The problem grabbed the attention of the international community in mid-2007 when attacks in Estonia crippled systems for weeks. Websites, which normally received 1,000 hits a day, were receiving 2,000 hits a second, thus rendering them useless.<sup>39</sup> Beginning shortly after a dispute between Estonia and Russia, the attacks included DDOS attacks not only against the parliament and presidential websites, but also cellular phone networks, major banks, and news media websites.<sup>40</sup> These attacks were also linked to Russia because of the timing of the attacks and the number of Russian domains involved, although the government denied involvement.<sup>41</sup>

The Russians are undoubtedly not the only State using cyberspace as a weapon. The Chinese are likely the most aggressive nation in building their

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<sup>32</sup> Markoff, *Before the Gunfire*, *supra* note 30.

<sup>33</sup> Jon Swaine, *Georgia: Russia 'Conducting Cyber War'*, THE TELEGRAPH, Aug. 11, 2008, <http://www.telegraph.co.uk/news/worldnews/europe/georgia/2539157/Georgia-Russia-conducting-cyber-war.html>.

<sup>34</sup> Markoff, *Before the Gunfire*, *supra* note 30.

<sup>35</sup> Markoff, *Georgia Takes a Beating*, *supra* note 31.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Kim Hart, *A New Breed of Hackers Tracks Online Acts of War*, WASHINGTON POST, Aug. 27, 2008, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/26/AR2008082603128.html>.

<sup>39</sup> Clay Wilson, BOTNETS, CYBERCRIME, AND CYBERTERRORISM: VULNERABILITIES AND POLICY ISSUES FOR CONGRESS, CRS RL32114, (Nov. 15, 2007) available at <http://www.fas.org/sgp/crs/terror/RL32114.pdf> (updated Jan. 29, 2008); see also Tony Halpin, *Putin Accused of Launching Cyber War*, THE TIMES (London), May 18, 2007 at 46, available at <http://www.timesonline.co.uk/tol/news/world/europe/article1805636.ece>.

<sup>40</sup> Halpin, *supra* note 39, at 46.

<sup>41</sup> Steven Lee Myers, *Computers Blitzed, Possibly by the Russians*, N.Y. TIMES, May 19, 2007, at A8, available at <http://www.nytimes.com/2007/05/19/world/europe/19russia.html?partner=rssnyt&emc=rss>.

cyberwarfare capabilities.<sup>42</sup> The Chinese are already undertaking cyber-espionage activities against the United States, and are creating plans to disrupt the U.S. domestic network on which the U.S. military heavily relies<sup>43</sup> in preparation for potential escalation of conflict between the two nations over Taiwan.<sup>44</sup> To compete with the United States more effectively, the Chinese military is rapidly establishing information warfare units to attack computer networks and accomplish its goal of “electromagnetic dominance.”<sup>45</sup>

The United States is also extremely active in preparing for engagements in cyberspace.<sup>46</sup> The impact of a State-sponsored cyber attack on the United States would be dramatic. When a firm on the New York Stock Exchange is attacked, it is estimated its share value drops between \$50 million and \$200 million.<sup>47</sup> Considering this is only an attack on a single firm, a broad-based attack on computer systems could not only impede the military from its defense function, but would also dramatically impact the economy. In 2005, the Air Force altered its mission statement to confront this challenge, which now includes as its goal, “to deliver sovereign options for the defense of the United States of America and its global interests—to fly and fight in air, space and *cyberspace*.<sup>48</sup> In an effort to deliver on its new goal of protecting cyberspace, the Air Force plans to open the Air Force Cyber Command, with 32,000

<sup>42</sup> ‘Cyber Warfare Instigator’ Label Rejected by China, THE NEW ZEALAND HERALD, Nov. 30, 2007, [http://www.nzherald.co.nz/it-security/news/article.cfm?c\\_id=239&objectid=10479283](http://www.nzherald.co.nz/it-security/news/article.cfm?c_id=239&objectid=10479283) (last visited Aug. 1, 2009) (citing a report by MacAfee Inc. which labeled China as “the world’s most aggressive offender in probing for holes in other nations’ internet security and encouraging a looming global cyber showdown”).

<sup>43</sup> U. S. GOV’T ACCOUNTING OFFICE, GAO-08-461, DEFENSE INFRASTRUCTURE, ACTIONS NEEDED TO GUIDE DOD’S EFFORTS TO IDENTIFY, PRIORITIZE, AND ASSESS ITS CRITICAL INFRASTRUCTURE 7, (May 2007) (“DOD estimates that it has identified about 25 percent of the critical infrastructure it owns, and DOD officials expect to finish identifying the remaining infrastructure assets that it controls (estimated to be about 15 percent of the total) by the fiscal year 2008–2009 time frame. The remainder of its mission-critical infrastructure - estimated to be about 85 percent of the total - is owned by non-DOD entities and considerably less of this infrastructure has been identified.”).

<sup>44</sup> *China’s Proliferation Practices, and the Development of its Cyber and Space Warfare Capabilities: Hearing Before the U.S.-China Economic and Security Review Commission*, 110th Cong., 58 (2008) (statement of James Mulvenon, Director, Advanced Studies and Analysis Defense Group, Inc.) [hereinafter Mulvenon’s Statement on China’s Proliferation].

<sup>45</sup> Office of the Secretary of Defense, *Military Power of the People’s Republic of China 2007*, Annual Report to Congress, at 22, available at <http://www.defenselink.mil/pubs/pdfs/070523-China-Military-Power-final.pdf>.

<sup>46</sup> Julian E. Barnes, *Hacking Could Become Weapon in U.S. Arsenal*, L.A. TIMES, Sept. 8, 2008, at A-1, available at <http://articles.latimes.com/2008/sep/08/nation/na-cyber8>.

<sup>47</sup> Brian Cashell, William D. Jackson, Mark Jickling, & Baird Webel, *The Economic Impact of Cyber-Attacks*, CRS RL32331 (Apr. 1, 2004).

<sup>48</sup> Lieutenant Colonel Paul Berg, Air Force Cyber Command, *Air Force Works to Defend Cyberspace, Too*, June 30, 2008, <http://www.afcyber.af.mil/news/commentaries/story.asp?id=123104768> (last visited Aug. 4, 2009) (emphasis added).

airmen.<sup>49</sup> Not to be outdone, on July 2, 2008, the Army activated the Network Warfare Battalion to support its own cyber mission.<sup>50</sup>

There are four important reasons why military attention has been increasingly focused on combat in cyberspace. The first was best stated by a Chinese military writer who wrote that cyberwarfare is “one of the most effective means for a weak military to fight a strong one.”<sup>51</sup> Where previously expensive tanks and missiles were necessary to compete militarily, now all that could be required is a computer and a creative hacker. Related to this point, the ease of deniability when outsourcing a computerized attack, because of the difficulties in attributing cyber attacks, makes them all the more attractive as a tool for States.<sup>52</sup> The second reason is the remarkably low cost of attacking computers. One expert on the subject noted that it costs only around four cents per computer to undertake an attack.<sup>53</sup> The third reason is the remarkably large number of critical functions computers perform for militaries and civilians. Today, essentially every industry uses computer networks to perform critical functions, providing a fantastic number of targets for enemy States. So many targets are now available, in fact, that the United States has altered its posture to focus on protecting “critical infrastructure,” rather than taking a broad protective stance.<sup>54</sup> The fourth reason is the simple fact that countries can resolve military objectives without using armed force, which limits casualties and costs, reducing the likelihood of retaliation.<sup>55</sup>

### C. Legal Obstacles Facing Cyberwarfare

The LOAC is divided into two general categories: (1) *jus ad bellum*, designed to set criteria determining when entry into war is justified, and (2) *jus in bello*, which examines the legality of acts during a conflict.<sup>56</sup> While the *jus in bello* is certainly not inconsequential to the question of cyberwarfare, of primary

<sup>49</sup> Michael Hoffman, *Cyber Command Takes Shape*, AIR FORCE TIMES, July 4, 2008, [http://www.airforcetimes.com/news/2008/07/airforce\\_cyber\\_career\\_070308/](http://www.airforcetimes.com/news/2008/07/airforce_cyber_career_070308/).

<sup>50</sup> Press Release, U.S. Army, Army Activates Network Warfare Unit (July 2, 2008) available at <http://www.army.mil/-newsreleases/2008/07/02/10569-army-activates-network-warfare-unit/>.

<sup>51</sup> Mulvenon’s Statement on China’s Proliferation, *supra* note 44, at 63.

<sup>52</sup> See Susan W. Brenner, “At Light Speed”: Attribution and Response to Cybercrime/Terrorism/Warfare, 97 J. CRIM. L. & CRIMINOLOGY 379, 424 (2007) (“If the attacks were launched from within its territory, our hypothetical State sponsor of cybercrime and cyberterrorism could still credibly deny involvement with them.”).

<sup>53</sup> Markoff, *Georgia Takes a Beating*, *supra* note 31.

<sup>54</sup> U.S. Depar’t of Homeland Security Charter of the Critical Infrastructure Partnership Advisory Council, Mar. 20, 2006, available at [http://www.dhs.gov/xlibrary/assets/CIPAC\\_charter.pdf](http://www.dhs.gov/xlibrary/assets/CIPAC_charter.pdf) (The role of the Council is to plan and coordinate the implementation security measures in specifically outlined critical infrastructure industries like energy, banking, defense, and agriculture.).

<sup>55</sup> See Kenneth B. Moss, *Information Warfare and War Powers: Keeping the Constitutional Balance*, 26 FLETCHER F. WORLD AFF. 239, 241 (2002).

<sup>56</sup> INGRID DETTER DELUPIS, THE LAW OF WAR 156-158 (Cambridge Press, 2nd ed. 2000).

legal concern is determining when a cyber attack justifies some form of retaliation; thus the focus of this discussion is on the *jus ad bellum* aspects of the LOAC. A key obstacle towards restricting acts of cyberwarfare is the ambiguity in international law surrounding the definition of “use of force.”<sup>57</sup> It is unclear whether a “use of force” is restricted only to physical attacks, or whether a cyber attack could also be considered a “use of force” under international law. This section outlines this ambiguity.

The modern foundation for determining the propriety of war is the U.N. Charter.<sup>58</sup> Having perhaps one of the most volatile histories in all of international law due to the debate and controversy it has aroused,<sup>59</sup> article 2 paragraph 4 of the U.N. Charter sets some lofty goals stating that “[a]ll Members shall refrain in their international relations from the threat or *use of force* against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>60</sup> This provision is controversial and revolutionary for two reasons. First, the basic purpose is to eliminate States using warfare to resolve conflicts.<sup>61</sup> Yet sixty years after the U.N. Charter was ratified, this goal is unrealized, and is often disregarded or circumvented through loopholes.<sup>62</sup> Nevertheless, one cannot underestimate the impact of Article 2(4) on delegitimizing warcraft as an acceptable strategy. Second, the phrase “use of force” has led to considerable debate in legal circles regarding what types of acts constitute a “use of force.”<sup>63</sup> This debate is particularly applicable to cyberwarfare. If cyber attacks are not considered a “use of force,” then the Security Council might be less inclined to view it as a threat to the peace.

The phrase “use of force” brings to mind physical violence (kinetic force), not the destruction or manipulation of electronic data that occurs in cyberwarfare (non-kinetic). Anyone taking an originalist or textualist interpretation of the Charter could take this same view as the Charter was drafted in the 1940’s, well before anyone could conceive of the devastating impact computers and non-kinetic attacks could have on the world. This

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<sup>57</sup> See *supra* note 5.

<sup>58</sup> The Charter, having been ratified by nearly every State, and having substantial influence on customary international law, guides the propriety of conflict in many respects, especially through chapters I, VI, and VII.

<sup>59</sup> See generally David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT’L L. 387 (2007).

<sup>60</sup> U.N. Charter art. 2, para. 4; see also John D. Becker, *The Continuing Relevance of Article 2(4): A consideration of the U.N. Charter’s Limitations on the Use of Force*, 32 DENV. J. INT’L L. & POL’Y 583 (2004).

<sup>61</sup> U.N. Charter art. 2, para. 4.

<sup>62</sup> One need only consider the intense debate surrounding the NATO actions in Kosovo, or the U.S. invasion of Iraq in 2003, to recognize that using law in an attempt to limit conflict is not a perfect system.

<sup>63</sup> See Aldrich, *supra* note 4.

perspective is strengthened by the Vienna Convention on the Law of Treaties (VCLT), which states, “[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>64</sup> Sources from the United Nations indicate that the “ordinary meaning” of the “use of force” prohibition should be restricted only to kinetic attacks.<sup>65</sup>

As the Charter was drafted, the major powers objected to defining an act of aggression with specificity, making it difficult today to know how to interpret Article 2(4).<sup>66</sup> The U.N. General Assembly, however, provided important guidance to this question in 1974 with the passage of Resolution 3314 which defined aggression as “the use of *armed force* by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”<sup>67</sup> Not only did the U.N. General Assembly make clear that aggression requires armed force, but they listed seven different examples of aggression, all of which involve some form of kinetic attack.<sup>68</sup>

Further, Article 51 of the U.N. Charter indicates that cyberwarfare is not the type of attack that the founders of the United Nations intended. It states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations . . . .”<sup>69</sup> Here, the term “armed attack” strongly indicates that a response to aggression can only be justified after a kinetic attack. As it is written, only an armed attack can trigger a defensive action. If this is the intent, it could give more credence to an interpretation of Article 2(4) that only armed attacks were meant to be covered by the drafters.

Additional guidance as to “use of force” can be garnered from an unrelated debate over a different type of non-kinetic attack, in the form of economic sanctions. During the drafting of the U.N. Charter, Brazil proposed to extend the power of Article 2(4) to economic coercion.<sup>70</sup> The proposal was resoundingly defeated by a vote of 26-2, further indicating that the Charter’s

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<sup>64</sup> Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (emphasis added).

<sup>65</sup> See G.A. Res. 3314 (XXIX), U.N. Doc. A/9732 (Dec. 14, 1974); U.N. Charter, pmb; Omer Y. Elagab, *Economic Measures against Developing Countries*, INT’L & COMP. L.Q., Vol 41, No. 3, 682 (1992).

<sup>66</sup> LEELAND M. GOODRICH, EDWARD HOMBRO & ANNE PATRICIA SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 44 (Columbia Univ. Press 1969) (1949).

<sup>67</sup> G.A. Res. 3314, *supra* note 66, at 143 (emphasis added).

<sup>68</sup> *Id.* The resolution did, however, make clear the list was not exclusive.

<sup>69</sup> U.N. Charter, art. 51 (emphasis added).

<sup>70</sup> Elagab, *supra* note 65, at 688.

authors were primarily concerned with kinetic attacks.<sup>71</sup> As the VCLT points out, for interpretation purposes, preambles or annexes to a treaty should be considered.<sup>72</sup> The preamble to the U.N. Charter states that one of the purposes of the United Nations is to ensure “that *armed force* shall not be used, save in the common interest . . .”<sup>73</sup> Here, the Charter implies the goal of limiting only the use of armed force, with no mention of non-kinetic attacks. There has also been a lengthy debate in academic circles regarding the meaning of Article 2(4), and it appears that most academics tend to agree that the Article was intended only to prohibit armed force.<sup>74</sup>

If a consensus existed that international law is not suited to accommodate cyberwarfare, as the above discussion would suggest, then there would at least be a point of agreement from which the international community could form new guidelines with the goal of combating this developing problem. States could reach some new agreement on cyberwarfare. There is ample evidence, however, to allow for the interpretation that Article 2(4) should cover acts of cyberwarfare. These dueling interpretations leave the problem in limbo and a solution far more difficult to obtain.

Relying on the intent of the Charter’s authors to prove that cyberwarfare fits within the United Nations’ authority could lead to an opposite interpretation of the Charter, one which would alter how cyberwarfare is viewed under Article 2(4). There is ample evidence from the text of the Charter to reinforce this argument. For example, the preamble of the U.N. Charter states that a purpose of the United Nations is to “maintain international peace and security.”<sup>75</sup> Article 2(3) lays out a basic principle for States to follow, saying “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>76</sup> Clearly, the intention of the Charter’s authors was to end not only “armed conflict,” but also anything that might challenge “peace and security.” A cyber attack could easily threaten peace and security when one considers the importance of cyberspace in regulating modern society. Article 2(4) restricts the use of force “in any other manner inconsistent with the Purpose of the United Nations.”<sup>77</sup> Since the maintenance of the “peace and security” can be easily interpreted as a “Purpose of the United Nations,” cyberwarfare could fall under the umbrella of Article 2(4). The Article also requires States to

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<sup>71</sup> *Id.*

<sup>72</sup> Vienna Convention on the Law of Treaties, *supra* note 64, at art. 31(2).

<sup>73</sup> U.N. Charter, pmb1. (emphasis added).

<sup>74</sup> See *supra* note 5.

<sup>75</sup> U.N. Charter, prmb1.

<sup>76</sup> U.N. Charter art. 2, para. 3.

<sup>77</sup> *Id.* at art. 2, para. 4.

refrain from the “use of force against the *territorial integrity . . . of any State.*”<sup>78</sup> The phrase “territorial integrity” could be interpreted in many ways, such as whether a State’s territorial integrity includes its cyberspace. If so, a cyber attack might be defined as a “use of force.” Article 39 gives the Security Council the power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression,” against a State, and to take steps to restore the “peace and security.”<sup>79</sup> This power further adds to a broad number of points within the U.N. Charter which indicates the primary goal of the treaty is not only to limit the use of “armed forces,” but to ensure “peace and security.”

The United States seems to favor this interpretation of “use of force.” In 1999 the Department of Defense General Counsel’s office put together a memo that addressed various legal aspects of information operations.<sup>80</sup> In defining what constitutes a sufficient provocation to war, the memo says, “[a]n act of war is a violation of another nation’s rights under international law that is so egregious that the victim would be justified in declaring war.”<sup>81</sup> This memo goes on to state:

It seems unlikely that the Security Council would take action based on an isolated case of state-sponsored computer intrusion producing little or no damage, but a computer network attack that caused widespread damage, economic disruption, and loss of life could well precipitate action by the Security Council. The debate in such a case would more likely center on the offender’s intent and the consequences of the offending action than on the mechanism by which the damage was done.<sup>82</sup>

It becomes clear that the United States believes that a cyber attack which sufficiently causes damage to lives, property, or the economy would be sufficient to trigger reprisals.

There are two very reasonable interpretations of whether an act of cyberwarfare could trigger an international response based on the definition of

<sup>78</sup> *Id.* (emphasis added).

<sup>79</sup> *Id.* at art. 39.

<sup>80</sup> Office of the Gen. Counsel, Dep’t of Defense, *An Assessment of International Legal Issues in Information Operations*, 12 May 1999, available at <http://www.au.af.mil/au/awc/awcgate/dod-io-legal/dod-io-legal.pdf>.

<sup>81</sup> *Id.* at 12.

<sup>82</sup> *Id.* at 15.

“use of force” as described in Article 2(4). Under one perspective, the “use of force” prohibition would only be implicated by armed attacks, leaving cyberwarfare uncovered by Article 2(4). Another perspective, looking more broadly at the entirety of the Charter, would define the purpose of the United Nations as to protect the “peace and security” of the world, and that the Charter punishes any “use of force” that intrudes on the peace and security. Under this interpretation, an act of cyberwarfare could be found to trigger action under Article 2(4). These differences drive uncertainty about how to approach the problem of cyberwarfare and delay concerted efforts to identify a solution. The lack of a catastrophic cyber attack within the West only promotes a “wait and see” mentality. Rather than allowing a major conflict to arise after an act of cyberwarfare, the international community must be proactive in creating a source of law on the subject which could help to deflate tensions if and when a conflict occurs. Even if this were to happen, however, there would be the challenge of attribution to overcome before cyberwarfare could be effectively resolved.

#### D. The Problem of Attribution

In most situations, a State that has invested in cyber security can protect its systems, at least in relation to its most critical functions.<sup>83</sup> Nonetheless, simply defending one’s system is not sufficient. If a person is unsuccessfully burglarized, society wants not only to stop that single act of burglary, but also to identify the criminal, bring him to justice, and deter others from committing the same crime. Attribution is therefore its own end and essential to deterring other acts of cyberwarfare. A second reason attribution is important is that determining the source of an attack alters the type of response available to a State.<sup>84</sup> A right to self defense under Article 51 of the U.N. Charter can be triggered where a State is responsible for an attack,<sup>85</sup> while if an individual launches the attack, he or she would be prosecuted under domestic laws.<sup>86</sup> Attributing an act of cybercrime is challenging enough,<sup>87</sup> but attributing such an act to a State is even more difficult. Thus, even if States addressed the problem by creating clear international law, it is unlikely that cyberwarfare would be resolved without overcoming the attribution question.

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<sup>83</sup> See generally White House, *The National Strategy to Secure Cyberspace*, at 3 (Feb. 2003), available at [http://www.dhs.gov/xlibrary/assets/National\\_Cyberspace\\_Strategy.pdf](http://www.dhs.gov/xlibrary/assets/National_Cyberspace_Strategy.pdf) (clarifying that the U.S. reserves the right to respond to a cyber attack without making an attribution).

<sup>84</sup> Lieutenant Colonel Richard W. Aldrich, *How do you Know you are at War in the Information Age?*, 22 HOUS. J. INT'L L. 223, 232 (2000).

<sup>85</sup> The discussion above of course makes this statement questionable. The answer might largely depend on the severity of an attack.

<sup>86</sup> See Aldrich, *supra* note 84, at 232 (domestic laws may include those implemented due to the passage of the Convention on Cybercrime).

<sup>87</sup> Hunker et al., *supra* note 10, at 5.

Attribution is defined as, “determining the identity or location of an attacker or an attacker’s intermediary.”<sup>88</sup> Attributing a cyber attack to a State requires a two-step process.<sup>89</sup> First, a State must locate the perpetrator of the act.<sup>90</sup> Second, States must link that individual and his actions to a government.<sup>91</sup> For many acts of cybercrime, the United States has appropriate laws and institutions in place to prosecute responsible actors.<sup>92</sup> The FBI’s Cyber Division, the U.S. Secret Service, the Department of Justice’s Computer Crime and Intellectual Property Section, and the Department of Homeland Security all play an important role in this enterprise<sup>93</sup> and have legal access to resources allowing a physical investigation to locate the perpetrator of a cybercrime once the digital detective work is done.<sup>94</sup> The National Strategy to Secure Cyberspace states, “Ideally, an investigation, arrest, and prosecution of the perpetrators [of an act of cybercrime], or a diplomatic or military response in the case of a State-sponsored action will follow such an incident.”<sup>95</sup> This statement recognizes the importance of using more than cyber forensics to apprehend a cyber criminal. Cyber forensics can often lead investigators to a specific computer, but rarely identifies the person using that computer at the time the crime was committed.<sup>96</sup> While much of the investigation takes place electronically to determine the source of the attack, it is certainly not the end of the attribution process.<sup>97</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> See generally Brenner, *supra* note 52 (discussing generally the challenges associated with attributing a cyber crime, and implies that typically, a physical investigation by law enforcement authorities is generally necessary to make an accurate attribution).

<sup>90</sup> *Id.* at 405-429.

<sup>91</sup> See *id.* at 411-412 (“Historically, it was reasonable to equate transnational attacks with acts of war because only a nation-State could launch such an attack. That is still true for the real-world, but cyberspace gives each nation-State an incremental, highly permeable set of ‘virtual’ national borders. Anyone with Internet access and certain skills can launch a cross-border virtual attack, not on the territory but on the machinery of an external nation-State. A virtual attack is not territorially invasive, but it produces effects in the victim-State’s territory that are damaging in various ways and in varying degrees.”).

<sup>92</sup> See Veta & Rubin, *supra* note 6.

<sup>93</sup> White House, *supra* note 85, at 29.

<sup>94</sup> See Veta & Rubin, *supra* note 6, at 966-994 (referencing various domestic laws to enforce cyber crime legislation).

<sup>95</sup> *Id.*

<sup>96</sup> See generally Hunker ET AL., *supra* note 10, at 7.

<sup>97</sup> See generally ALBERT J. MARCELLA, ALBERT J. MARCELLA JR., & DOUG MENENDEZ, CYBER FORENSICS: A FIELD MANUAL FOR COLLECTING, EXAMINING, AND PRESERVING EVIDENCE OF COMPUTER CRIMES (Auerbach Publications 2007) (providing a thorough explanation of various techniques to investigate cyber crime).

Once the digital investigation is complete a physical investigation is typically required to locate the person associated with the attack.<sup>98</sup> For example, if an investigator has determined some form of cybercrime was initiated through a computer in a student computer lab located on a university campus in Texas, the person using that computer is not likely to be known initially. Their identity could still be determined by collecting information from the computer or by the typical criminal investigation involved in any other crime such as reviewing security cameras, interviews with others familiar with the computer, or other similar techniques.<sup>99</sup> Assuming this information would suffice to locate the person responsible, there is still more action needed to successfully attribute the attack to a government.

In many instances, if a person involved in cyberwarfare is arrested, linking him or her to a government might not be difficult. Perpetrators might be employees of the government, or have links that make the connection obvious. Due to the unique anonymity that the internet can provide its users, however, the link to a government will not always be so easy. The internet provides plausible deniability to a government seeking to outsource cyber attacks because of the ease with which separation can be placed between a Government's action approving an act of cyberwarfare and the person committing the act itself.<sup>100</sup> The Chinese government appears to be exploiting the internet in just this fashion.<sup>101</sup> It is believed that the Chinese military uses hacker competitions to recruit highly qualified individuals to perform work for the Chinese military, without directly being associated with those it recruits.<sup>102</sup> While this activity has its own serious implications within international law,<sup>103</sup> it could be practically impossible to link a person who committed a cyber attack on a government to a State without a physical investigation to determine funding sources and investigate personal contacts between the hacker and his or her associates.<sup>104</sup>

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<sup>98</sup> Hunker et al., *supra* note at 10, at 4 ("Attribution cannot . . . be accomplished strictly through the use of technology.").

<sup>99</sup> Because of the importance this physical investigation plays in solving cybercrimes, the government has outlined best practices for handling electronic evidence. See OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *Electronic Crime Scene Investigation, A guide for First Responders* (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/187736.pdf>.

<sup>100</sup> While State forces attacking with a gun or missile are typically distinguishable as belonging to that State because of the signature a weapon will leave, a computer-based attack can much more easily be outsourced to a third party who is unknown to other parties as an associate of the State.

<sup>101</sup> Tim Reid, *China's Cyber Army is Preparing to March on America, Says Pentagon*, THE TIMES (London), Sept. 8, 2007, at 43.

<sup>102</sup> *Id.*

<sup>103</sup> See Davis Brown, *A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT'L L.J. 179, 190-192 (2006) (discussing the requirement that an attack should only be conducted by lawful combatants).

<sup>104</sup> See Brenner, *supra* note 54.

When the challenge of attribution is applied outside of domestic borders, the problem becomes far more complex. In relation to cybercrime, the task of assigning responsibility is less difficult between those States that have ratified the Convention on Cybercrime, due to their dedication to easing jurisdictional hurdles, and the implementation of various domestic laws to outlaw cybercrime.<sup>105</sup> When dealing with cyberwarfare, there is little recourse for the victim State without making an appropriate attribution to the attacker because any attacking State can easily avoid an investigation into its actions. The U.S. government has recognized this challenge, stating that “[s]ecuring global cyberspace will require international cooperation to raise awareness, increase information sharing, promote security standards, and investigate and prosecute those who engage in cybercrime.”<sup>106</sup> Until that occurs, and the jurisdictional challenges involved with investigating alleged acts of cyberwarfare are resolved, so that attribution can be made, the larger problem of cyberwarfare will not subside.

#### E. Where Do We Go From Here?

Two points seem clear in relation to the challenges facing cyberwarfare. First, the international law that could apply to combat cyberwarfare is in such an undeveloped State – because of the unique nature of cyberspace and cyber attacks – that it is essentially unworkable in any application to cyberwarfare. Second, even if a workable legal framework existed, it would be useless without the ability to attribute an attack to a State. Without a resolution to these problems, States will face pressure to defend themselves in an increasingly aggressive manner as cyber attacks grow in number. Though States will attempt to defend their networks, the culprit will rarely, if ever, be located or reprimanded. This inability to pursue cyber attackers will leave States vulnerable to repeated attacks<sup>107</sup> and military leaders unclear as to what cyberwarfare tactics are legally acceptable.<sup>108</sup>

Due to the near certainty that cyberwarfare will play a central role in future warfare,<sup>109</sup> an international framework to improve the legal clarity of the problem is inevitable. Many frameworks based on the creation of a new treaty

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<sup>105</sup> See Convention on Cybercrime, *supra* note 7.

<sup>106</sup> White House, *supra* note 83, at 51.

<sup>107</sup> Hunker et al., *supra* note 10, at 5 (“The prospect of an attacker being identified can serve as a deterrent to future attacks.”).

<sup>108</sup> Jon P. Jurich, *Cyberwar and Customary International Law: The Potential of a “Bottom-Up” Approach to an International Law of Information Operations*, 9 CHI. J. INT’L L. 275, 286 (2008).

<sup>109</sup> See generally Peter Brookes, *Flashpoint: The Cyber Challenge, Cyber Attacks are Growing in Number and Sophistication*, ARMED FORCES JOURNAL, Mar. 2008, available at <http://www.armedsjournal.com/2008/03/3463904>.

have already been proposed,<sup>110</sup> while some believe the best solution may be to rely on customary international law to evolve to combat the problem.<sup>111</sup> Both routes face their own hurdles. Any attempt to adopt an international treaty on cyberwarfare currently seems unlikely. To be sure, many States would support such a treaty. Those most involved in cyberwarfare, however, would likely be hesitant to ratify such a treaty because it would eliminate a tool that they see as an equalizing force against perceived enemies. Customary international law also has its own set of challenges because it relies on incremental adjustments based on actions taken by States, which means change can be a slow process that leaves ambiguity in the legal system.<sup>112</sup> Furthermore, customary international law requires the showing of a widespread practice, which can be difficult to quantify and prove.<sup>113</sup> Due to the rapid pace with which cyberwarfare is evolving, and the potentially catastrophic consequences that could stem from a major attack, the treaty-making process or the development of customary international law might take too long to prevent a major cyber conflict.

With these problems in mind, a solution is available that clarifies the legal uncertainty surrounding cyberwarfare, avoids the pitfalls of treaty avoidance as well as the potentially slow acceptance time with customary international law, and imposes a framework that allows for a neutral third party to undertake the investigations needed to attribute cyber attacks. That solution involves implementing a framework through the U.N. Security Council similar to that imposed by U.N. Security Council Resolution 1373 (UNSCR 1373) to combat terrorist financing.<sup>114</sup> The next section takes a closer look at UNSCR 1373 to better understand how it could be applied to cyberwarfare.

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<sup>110</sup> See Lieutenant Commander Steven M. Barney, *Innocent Packets: Applying Navigational Regimes From the Law of the Sea Convention by Analogy to the Realm of Cyberspace*, 48 NAVAL L. REV. 56 (2001); Brown, *supra* note 103 (proposing a convention on cyberwarfare based on the principles of the LOAC); Press Release, United Nations, Estonia Urges UN Member States to Cooperate Against Cyber Crimes (Sept. 25, 2007),

<http://www.un.org/apps/news/story.asp?NewsID=23977&Cr=general&Cr1=debate&Kw1=general+assembly&Kw2=&Kw3=>.

<sup>111</sup> Office of the General Counsel, *supra* note 82, at 50 (“There seems to be little likelihood that the international legal system will soon generate a coherent body of ‘information operations’ law. The most useful approach to the international legal issues raised by information operations activities will continue to be to break out the separate elements and circumstances of particular planned activities and then to make an informed judgment as to how existing international legal principles are likely to apply to them. In some areas, such as the law of war, existing legal principles can be applied with considerable confidence.”).

<sup>112</sup> MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS, WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 225 (Brill Publishing 1985).

<sup>113</sup> See *id.* at 1-13.

<sup>114</sup> See S.C. Res. 1373, *supra* note 12.

### **III. A CLOSER LOOK AT U.N. SECURITY COUNCIL RESOLUTION 1373**

The U.N. Security Council's powers have fluctuated dramatically over the decades. The past twenty-five years have seen particularly dramatic change for the Council, as the fall of the Berlin Wall has eliminated the ideological divide that kept the body from functioning effectively.<sup>115</sup> Since that time, the Security Council has been using more expansive powers to protect the "peace and security" of the world.<sup>116</sup> An important turning point in its power occurred in 2001 when it passed U.N. Security Council Resolution 1373, which imposed on all States the responsibility of cracking down on terrorist financing.<sup>117</sup> With the passage of this resolution the Security Council imposed itself further into States' domestic law than was normal prior to UNSCR 1373. Furthermore, with the passage of UNSCR 1373, the Security Council began taking on a legislative character,<sup>118</sup> targeting its actions towards all member States rather than a single trouble-making State.<sup>119</sup> Although the passage of similar resolutions have occurred only sparingly since 2001, it provides a model for addressing some of the more pressing international issues, such as cyberwarfare. This section will take a closer look at UNSC 1373, to better understand how it can be used as a template for combating cyberwarfare.

#### **A. A Changing Perspective From the Security Council on Protecting "Peace and Security"**

The Security Council has broad powers to maintain international peace and security. In prescribing its responsibilities, the U.N. Charter states, "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."<sup>120</sup> Furthermore, all parties to the Charter "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."<sup>121</sup> This responsibility to

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<sup>115</sup> DAVID MALONE, *Introduction to THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21<sup>ST</sup> CENTURY* 4 (David Malone ed., 2004).

<sup>116</sup> As is its primary directive under the U.N. Charter art. 24, para. 1.

<sup>117</sup> S.C. Res. 1373, *supra* note 12.

<sup>118</sup> In 2004, the President of the Security Council, Gunter Pleuger of Germany, recognized the necessity of the body to take on more legislative responsibility stating, while referencing S.C. Res. 1373, "that [the] Council would be needed more and more to do that kind of legislative work." Press Release, Security Council, Press Conference by Security Council President, (Apr. 2, 2004), <http://www.un.org/News/briefings/docs/2004/pleugerpc.DOC.htm> [hereinafter Security Council Press Release].

<sup>119</sup> The resolution states in the binding sections that "all States shall . . ." S.C. Res. 1373, *supra* note 12, at sec. 1 & 2.

<sup>120</sup> U.N. Charter art. 24, para. 1.

<sup>121</sup> U.N. Charter art. 25.

maintain “peace and security” confers on the Council exceptional powers, with few explicit limitations.

In addition to the responsibilities outlined above, Article 34 gives the Council the power to investigate any dispute or situation that could “endanger the maintenance of international peace and security.”<sup>122</sup> If it determines there is a “threat to the peace,” the Security Council can take steps to maintain the peace under Article 39.<sup>123</sup> The Council can call on States to impose “measures not involving the use of armed force,”<sup>124</sup> a broad authority to begin with; or in the case that these measures are insufficient, it can impose armed force.<sup>125</sup> Finally, the member States of the U.N. “shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”<sup>126</sup> Thus, not only are these powers generally stated, leaving the Security Council free to define its limits, but member States are bound to abide by its decisions.

While the U.N. Charter granted the Security Council broad powers, only in the past twenty years has the Council begun pushing the boundaries of what it can do to maintain peace and security. During the Cold War, the Council was seen as a body dedicated to the prevention of World War III.<sup>127</sup> After the fall of the Berlin Wall, the focus turned to combating long-neglected regional troubles or those arising due to the Soviet break-up.<sup>128</sup> Before the fall of the Soviet Union, the requirement of consensus by the five permanent members<sup>129</sup> led to division on most matters due to the rift between the U.S. and the Soviet Union.<sup>130</sup> After the fall of the Soviet Union, however, agreement could be found between the former adversaries on a variety of new issues, thus freeing the Security Council to new forms of action.<sup>131</sup>

This new climate among the five permanent members of the Security Council led to a more expansive view of the body’s powers.<sup>132</sup> The responsibility of protecting the “peace and security” is no longer confined to

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<sup>122</sup> U.N. Charter art. 34.

<sup>123</sup> See U.N. Charter art. 39.

<sup>124</sup> U.N. Charter art. 41.

<sup>125</sup> U.N. Charter art. 42.

<sup>126</sup> U.N. Charter art. 49.

<sup>127</sup> MALONE, *supra* note 115.

<sup>128</sup> *Id.*

<sup>129</sup> U.N. Charter art. 27, para. 3.

<sup>130</sup> MALONE, *supra* note 115, at 4.

<sup>131</sup> Examples include the first action in Iraq, humanitarian intervention in Somalia and Bosnia, and the criminal tribunals in Rwanda and the former Yugoslavia. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275, 283 (2008). Agreement could not be found, however, regarding every important international dispute, with the most glaring example being the conflict regarding Kosovo.

<sup>132</sup> See *id.*; MALONE, *supra* note 115.

preventing an eminent armed attack and sanctioning aggressive States, but now also frequently includes addressing other root causes of a breach to peace and security. There are various examples of the Security Council expanding their role in this way, such as the humanitarian missions within Somalia and Bosnia,<sup>133</sup> the setting of boundaries between States,<sup>134</sup> and recognition that the AIDS pandemic was a possible threat to worldwide stability and security.<sup>135</sup> While the Security Council expanded its powers through these actions in the 1990's, its powers remained limited in one important way. Whenever the Security Council imposed itself on all States, it would only do so in relation to a limited purpose and for a limited duration in order to force compliance by a particular State to a particular goal.<sup>136</sup>

To do otherwise, by requiring States to conform to some more broad convention without their consent, would be contrary to an important principle of international law. Throughout history, State sovereignty has required adherence to the fundamental principle that international law be created through consensus. As one U.N. scholar notes:

It has long been accepted that intergovernmental organizations cannot legislate international law. ‘Hard,’ or binding, international law could be created only by States, whether through the adoption and ratification of treaties, the creation of customary law by means of general practice supported by *opinio juris*, or the cognition of general principles of law.<sup>137</sup>

This fundamental tenet of international law, that only States could make binding legislative international law, has eroded since the adoption of UNSCR 1373.

Upon adoption of UNSCR 1373, observers recognized the new legislative tone assumed by the Security Council.<sup>138</sup> International legislation is

<sup>133</sup> S.C. Res. 733, U.N. Doc. S/Res/733 (Jan. 23, 1992) (Regarding Somalia); S.C. Res. 1034, U.N. Doc. S/RES/1034 (Dec. 21, 1995) (Regarding Bosnia and Herzegovina).

<sup>134</sup> S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991) (establishing the boundary between Iraq and Kuwait).

<sup>135</sup> S.C. Res. 1308, U.N. Doc. S/RES/1308 (July 17, 2000).

<sup>136</sup> Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901-902 (2002).

<sup>137</sup> *Id.* at 901 (While binding law can be created through transnational organizations, for example, in the field of international transportation regulation, they tend to do so in areas that are not controversial. As an example, see Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295).

<sup>138</sup> See José E. Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 SUFFOLK TRANSNAT'L L. REV. 591, 603 (2008) (“These resolutions, particularly Resolution 1373

not like the traditional definition of legislation within a State, as any act that an intergovernmental organization takes will have some legislative characteristics. The difference between international legislation and other typical actions taken by intergovernmental organizations has dramatic implications for international law. Stated succinctly:

The hallmark of any international legislation is the *general and abstract character* of the obligations imposed. These may well be triggered by a particular situation, conflict, or event, but they are not restricted to it. Rather, the obligations are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time.<sup>139</sup>

This definition of international legislation makes clear the important distinction between the usual expression of Security Council power and international legislation: that international legislation is broad in character and application, as opposed to being applied to specific States or for limited durations.

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and 1540, are legislative in tone. While they seek to bind States under Chapter VII of the U.N. Charter, they are not, unlike prior Chapter VII resolutions, targeting the behavior of one State whose actions threaten the peace. These resolutions purport to address and to bind all States and appear to short circuit the tried and true method for prior global regulation: namely multilateral treaty making."); José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874 (2003) ("The counterterrorism efforts of the UN Security Council and its Counter-Terrorism Committee pursuant to Resolution 1373 . . . present the clearest examples of that body's new 'legislative' phase."); José E. Alvarez, *The UN's 'War' on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 241 (2003) ("The Council is apparently no longer content with seeing itself as the enforcement arm of norms that are legislated elsewhere by the international community. It is increasingly acting itself as legislator and executor of new rules for the international community."); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881, 883 (2006); Johnstone, *supra* note 131, at 283 ("Rather than issuing commands to deal with a discrete conflict, [UNSC 1373] create[s] obligations of a sort usually found only in treaties."); Jane E. Stromseth, *The Security Council's Counter-Terrorism Role: Continuity and Innovation*, 97 AM. SOC'Y INT'L L. PROC. 41, 41 (2003) ("This broad resolution is legislative in nature, imposing obligations on States not in response to a particular conflict but in response to the more global threat to peace and security posed by terrorism."); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175 (2005) ("As has recently been noted, the Security Council has entered its legislative phase. This phase began on September 28, 2001, with the adoption of Resolution 1373."); *see generally* Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INT'L L.J. 475, 482 (2002); Szasz, *supra* note 136.

<sup>139</sup> Talmon, *supra* note 138, at 176.

Legislating through the Security Council first manifested in UNSCR 1373,<sup>140</sup> and has since been followed by U.N. Security Council Resolution 1540 (UNSCR 1540), which seeks to eliminate the proliferation of weapons of mass destruction.<sup>141</sup> It is still unclear how far the Security Council can press this legislative power. If the Security Council's practice of legislating comes to be an acceptable method of international lawmaking, it will be a powerful tool for fighting a broad range of international problems, including cyberwarfare. The dilemma that this type of resolution brings upon States is that never before have they faced such strong pressure to be bound by international law when they have had so little input in the formation of those laws.<sup>142</sup> While States can avoid the Security Council's imposition of this new form of law by withdrawing from the United Nations, doing so would create dramatic consequences. Withdrawing also might not be effective because any new law imposed by the Security Council could transform into customary international law in short order. The next section will take a closer look at UNSCR 1373 to better understand how it fits within this mold of international legislation, and serves as a pretext for understanding how it could be used as a basic framework for an international law on cyberwarfare.

### B. A Closer look at UNSCR 1373

UNSCR 1373 was adopted seventeen days after the terrorist attacks of September 11, 2001. Considering the impact of the Resolution not only on terrorist financing, but also on how it changed the power of the Security Council, it is remarkable that it passed so smoothly. Nevertheless, when considering not just the impact of the Resolution, but the political ramifications at the time, one can understand why it did pass so quickly. In the wake of the terrorist attacks, the member States of the Security Council had been given orders by their respective governments to cooperate with the U.S.<sup>143</sup> At the time, the international community recognized the need for swift action, not only to combat the problem of terrorism, but to demonstrate relevance in a time of tragedy. The Security Council imposed a resolution, adopted under Chapter

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<sup>140</sup> *Id.* at 175 ("... the Security Council has entered its legislative phase. This phase began on September 28, 2001, with the adoption of Resolution 1373.").

<sup>141</sup> S.C. Res. 1540, U.N. doc. S/RES/1540 (Apr. 28, 2004).

<sup>142</sup> Certainly States have always been subject to customary international law, but there are two important points that make this different than Security Council legislation. The first is that customary international law develops over time and allows for input and even objections to its development. Furthermore, a State can object at the norm's outset and typically not be bound by it. Secondly, customary international law requires broad compliance, whereas only fifteen States on the Security Council make binding legislation.

<sup>143</sup> Johnstone, *supra* note 131, at 284.

VII,<sup>144</sup> binding upon the member States of the United Nations to show unity in the newly invigorated battle against terrorism.

The most important words in all of UNSCR 1373 are written at the beginning of its first article in declaring “that all States shall.”<sup>145</sup> These words are broad in scope and assume the character of international legislation. Importantly, there are no limitations set within this Resolution – no sunset clauses, no limitation on the number of States affected, and no over-arching purpose to punish or control a specific rogue State. By writing these seemingly innocuous words, the Security Council required every State to undertake a number of actions as outlined in the Resolution. Most importantly, the Resolution began by requiring the criminalization of funds collected by a State’s nationals and intended for use by terrorist organizations.<sup>146</sup> Furthermore, it required the freezing of funds and assets of any person or entity involved in terrorism.<sup>147</sup> It then went on to declare that “all States shall” not support terrorism in any way,<sup>148</sup> and shall take steps to prevent terrorism,<sup>149</sup> eliminate safe havens,<sup>150</sup> prevent those who finance terrorism from using their State’s territory,<sup>151</sup> prevent terrorist movement with appropriate border controls,<sup>152</sup> bring discovered terrorists to justice,<sup>153</sup> and provide one another assistance in

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<sup>144</sup> S.C. Res. 1373, *supra* note 12.

<sup>145</sup> *Id.* at para. 1.

<sup>146</sup> *Id.* at para. 1 sec. a (“Prevent and suppress the financing of terrorist acts.”).

<sup>147</sup> *Id.* at para. 1 sec. b (“Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.”).

<sup>148</sup> *Id.* at para. 2 sec. a (“Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.”).

<sup>149</sup> S.C. Res. 1373, *supra* note 12, at para. 2 sec. b (“Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.”).

<sup>150</sup> *Id.* at para. 2 sec. c (“Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.”).

<sup>151</sup> *Id.* at para. 2 sec. d (“Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.”).

<sup>152</sup> *Id.* at para. 2 sec. g (“Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.”).

<sup>153</sup> *Id.* at para. 2 sec. e (“Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”).

investigating the financing or support of terrorism.<sup>154</sup>

The Resolution also created the Counter Terrorism Committee (CTC)<sup>155</sup> to monitor its implementation.<sup>156</sup> The bulk of the CTC's work is to assist States in implementing domestic legislation related to the mandates of UNSCR 1373.<sup>157</sup> To accomplish this task, the CTC has compiled an extensive list of best practices, which it works directly with States to implement.<sup>158</sup> In essence, the CTC creates a dialogue with States, asking for information on topics, receiving responses, and asking for clarifications, to ensure that there is no confusion about where a State can improve its laws in regards to the financing of terrorism.<sup>159</sup> Initially the results of the CTC were impressive, and most States were willing to comply with the Resolution.<sup>160</sup> After a slowing in compliance, the Security Council passed S.C. Res. 1535, to revitalize the CTC.<sup>161</sup> This revitalization included creating the Counter-Terrorism Executive Directorate, which greatly enhanced the CTC's ability to provide technical assistance and monitor State action regarding UNSCR 1373, while authorizing site visits to assist States that request further assistance.<sup>162</sup> The CTC has proven to be effective in that by 2006 most countries had established a framework for freezing assets, the CTC had received first reports from all U.N. member States

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<sup>154</sup> S.C. Res. 1373, *supra* note 12, at para. 2 sec. f ("Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.").

<sup>155</sup> *Id.* at para. 6 ("Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and calls upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution.").

<sup>156</sup> Security Council, *Guidelines of the Committee for the Conduct of its work*, at ¶ 1 sec. b, U.N. Doc. S/AC.40/2001/CRP.1 (Oct., 16, 2001), available at <http://www.un.org/sc/ctc/documents/guidelines.htm>.

<sup>157</sup> Security Council Counter-Terrorism Committee, The Committee's Mandate, <http://www.un.org/sc/ctc/aboutus.html> (last visited Aug. 4, 2009).

<sup>158</sup> Chairman of the Committee Pursuant to Resolution 1373, *Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate*, Letter delivered to the Security Counsel, U.N. Doc. S/2006/989 at 5 (Dec. 18, 2006), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terr%20S2006989.pdf>.

<sup>159</sup> Rostow, *supra* note 138, at 483.

<sup>160</sup> Johnstone, *supra* note 131, at 285.

<sup>161</sup> S.C. Res. 1535, U.N. Doc. S/RES/1535 (Mar. 24, 2004).

<sup>162</sup> Chairman of the Committee Pursuant to Resolution 1373, *Proposal for the Revitalization of the Counter-Terrorism Committee*, U.N. Doc. S/2004/124 (Feb. 19, 2004), available at <http://www.undemocracy.com/S-2004-124.pdf>.

and multiple reports from almost 150 other States, and States had begun making prosecutions.<sup>163</sup>

The legislative character of UNSCR 1373 is clear. It imposes upon *all* States a duty to combat the problem of financing terrorism. This legislative character, however, is not the only proof of the effectiveness of the Resolution. The CTC goes further by creating a body dedicated to continuing a dialogue and entrenching the spirit of UNSCR 1373 within the international community. By doing so, the CTC applies action to the words of the Resolution, involving States on a daily basis in the task of implementing action. Without a doubt, UNSCR 1373 has altered the fundamental norm within international law by requiring consensus among States regarding contentious issues.

### C. The Ramifications of UNSCR 1373

Since the implementation of UNSCR 1373, the passage of UNSCR 1540 has shown the Security Council's willingness to continue passing resolutions that are legislative in nature. The Security Council passed UNSCR 1540 in 2004, intending it to keep weapons of mass destruction (WMD) from terrorists.<sup>164</sup> Implemented in fashion similar to UNSCR 1373, under Chapter VII of the U.N. Charter, UNSCR 1540 is binding upon all States.<sup>165</sup> The key point of the resolution – using the words “all States shall” – was that States should refrain from providing support to those attempting to develop or obtain weapons of mass destruction<sup>166</sup> and must adopt laws to prohibit these actions.<sup>167</sup> While the Resolution passed unanimously, it did so with far more debate and concern over its legislative character than did UNSCR 1373.<sup>168</sup>

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<sup>163</sup> Johnstone, *supra* note 131, at 286; see also Bureau of International Organization Affairs, U.S. Dep't of State, *U.S. Report to the UN Counterterrorism Committee: Report to the Counterterrorism Committee pursuant to paragraph 6 of Security Council Resolution 1373 of 28 September 2001 Implementation of UNSCR 1373*, Dec. 19, 2001, at sections “Steps Taken By US,” and “1(d): What measures exist to prohibit the activities listed in this sub-paragraph?,” available at <http://www.state.gov/p/io/rls/rpt/2001/6917.htm> (mentioning some prosecutions made by the United States).

<sup>164</sup> S.C. Res. 1540, *supra* note 141.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at para. 1 (“Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.”).

<sup>167</sup> *Id.* at para. 2 (“Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.”).

<sup>168</sup> Johnstone, *supra* note 131, at 290-292.

The closer attention paid to the passage of international legislation received by UNSCR 1540 begs the question of whether States in the future will be comfortable enough with the Security Council's expanded authority to allow passage of other similar acts. There are some noted concerns with the continued use of international legislation by the Security Council. One argument is that Security Council legislation is *ultra vires* due to its expansion of authority beyond the intended meaning of the U.N. Charter. The argument goes that because Article 39 can be interpreted as giving authority to the Security Council to act only upon direct acts by an entity that threaten the peace or security, that the Council cannot take actions which are applied generally to all States.<sup>169</sup> This interpretation would relegate the Security Council to a policing role rather than allowing the Council broader power to squelch threats to peace and security before they manifest. This point is controversial because the broad authority delegated to the Security Council, and the absence of any restrictive language within the Charter regarding international legislation, seem to undermine the *ultra vires* argument as a legal foundation for restricting the Security Council's power.<sup>170</sup>

Another argument against international legislation is the democratic deficit accorded to the Security Council.<sup>171</sup> Due to the limited size of the Security Council,<sup>172</sup> it is inherently undemocratic in relation to the members of the U.N. not on the Council. Under the interpretation of the Security Council as a policing body, there seems to be a lesser need for democratic representation than for a body dedicated to shaping the world through a legislative process. Furthermore, the bulk of power on the Council rests in the five permanent members, who can veto any resolution, leaving the other States on the Council, those who might represent the world's small States' interests, unequipped to counter the permanent five. Any perception of a lack of legitimacy within the Security Council not only challenges its ability to expand its powers through legislation, but could diminish any authority it gained after the fall of the Soviet Union. Another argument related to the role of the Security Council as a

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<sup>169</sup> Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593, 599 (2003) ("In Chapter VII, Article 39 refers to 'any threat to the peace, breach of the peace or act of aggression', while the title to the chapter refers to 'acts of aggression'. The implication would seem to be that before the Council can act there must be a specific situation giving rise to either a danger to international peace and security (Chapter VI), or a threat to the peace, a breach of the peace, or an act of aggression (chapter VII).").

<sup>170</sup> Johnstone, *supra* note 131, at 299 ("Yet from a strictly legal perspective, Articles 24 and 25, and Chapter VII confer broad authority on the Council to take whatever measures it deems necessary to maintain and restore international peace and security. While the Security Council is first and foremost an executive body whose principal function is crisis management, no evident legal rule prohibits it from acting in a legislative or quasi-judicial manner.").

<sup>171</sup> Talmon, *supra* note 138, at 179 ("[A] patently unrepresentative and undemocratic body such as the Council is arguably unsuitable for international lawmaking.").

<sup>172</sup> U.N. Charter, art. 23, para. 1.

legislative body rather than a policing body, is that it circumvents the previously mentioned norm of positivism, requiring consent within the international legal system.<sup>173</sup> While to some this may be a welcome change, others will certainly object to a further erosion of the requirement of unanimous agreement for the creation of international law.

While these arguments are valid, it seems that because Resolution 1540 passed unanimously, and that the Security Council appears inclined to entrench its right to act as a legislative body,<sup>174</sup> that in certain circumstances, a legislative role for the Security Council will become acceptable over time. Due to the concerns related to the Security Council's legislating activities, however, it is likely that in the short-term, the body will limit the use of this tool. The circumstances for taking legislative actions need to meet three important criteria to avoid exacerbating international concerns of overreach by the Security Council. First, as in any action, a threat to the peace or security must exist. The difference here is in the degree of the threat. A *substantial* threat needs to be perceived to validate a more expansive legislative approach. Second, the Security Council should only use legislative power when the threat is immediate in nature. If the threat is not immediate, there are other more time-tested avenues for resolution, namely, the treaty-making process. Third, the Security Council should consider legislative actions when resolution through the treaty-making process or by customary international law poses some inherent obstacle. For example, when it is clear that certain States might naturally oppose a resolution of the problem – States that are also likely contributors to the problem – then legislative action by the Security Council should be an acceptable method for circumventing traditional requirements of international unanimity.

Cyberwarfare meets these criteria, making the issue an excellent candidate for the Security Council to exercise its legislative powers without raising State concerns regarding the legitimacy of such acts. In addressing the first of the three criteria outlined above, it seems intuitive that cyberwarfare is a threat to peace and security.<sup>175</sup> Cyber attacks could without a doubt damage national infrastructure, cost States billions of dollars, and provoke more

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<sup>173</sup> Talmon, *supra* note 138, at 179 (“Council practice may be criticized as contrary to the basic structure of international law a consent-based legal order.”).

<sup>174</sup> Security Council Press Release, *supra* note 118.

<sup>175</sup> Brown, *supra* note 103, at 181 (“Computer technology has advanced to the point where military forces now have the capability to inflict injury, death, and destruction via cyberspace. Not all of the injury is physical. Using techniques that disrupt automated systems or destroy or alter data, computers that fall into the wrong hands are capable of doing long-lasting personal and economic damage to military and civilians alike. The highly destructive scenarios that various authors have theorized, as well as the potential use of cyberwar techniques in asymmetrical warfare, underscore the need for an unambiguous standard of conduct for information warfare that will be universally recognized and respected . . .”).

expansive attacks.<sup>176</sup> The second requirement for legislative activity, that a threat be immediate, is certainly evident with cyberwarfare, as demonstrated by the recent attacks against Georgia and Estonia.<sup>177</sup> Cyberwarfare also meets the third requirement, that the problem being faced pose some inherent obstacle to the creation of a consensual international agreement. A number of States appear to view cyberwarfare as leveling the playing field against States with strong conventional forces. Therefore, potential culprits of cyberwarfare would likely resist a consensual international agreement to fight cyberwarfare.

It seems likely, therefore, that cyberwarfare would be a just and reasonable use of the Security Council's legislative abilities. The question remains regarding how a Security Council resolution would resolve the two main challenges posed by cyberwarfare: the confusion in the legal framework surrounding cyberwarfare, and the difficulties associated with properly attributing an act of cyberwarfare to a State. The next section outlines what a resolution to combat cyberwarfare based on the framework of UNSCR 1373 might look like, and briefly discusses the problems associated with the passage of such a resolution.

#### **IV. APPLYING UNSCR 1373 TO CYBERWARFARE**

UNSCR 1373 provides a new opportunity to create binding international law without unanimous consent by all States. Doing so avoids two of the important problems with the more traditional methods of creating binding international law. First, it circumvents the problems associated with treaty ratification, by not providing a State hoping to avoid prosecution the option of not ratifying the treaty. Second, UNSCR 1373 avoids the inherent difficulties associated with customary international law, primarily, that it often takes a long time to develop, and there are ambiguities involved in proving a widespread practice. While there are certainly legitimate concerns over the use of the Security Council to circumvent traditional requirements of unanimity in creating international law, the world seems more comfortable with this new process as long as it is undertaken only regarding important peace and security functions and as long as States outside of the Council are appropriately consulted.<sup>178</sup> Cyberwarfare is the type of problem where the circumvention of unanimity would be acceptable, due to the likelihood that it will play a serious role in any future conflict, and because it would be difficult to come to a consensus regarding an international law on cyberwarfare. Therefore, those interested in combating cyberwarfare should consider a framework loosely based on UNSC 1373. This section analyzes how a Security Council resolution based loosely on

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<sup>176</sup> See Cashell et. al., *supra* note 47.

<sup>177</sup> Markoff, *Before the Gunfire*, *supra* note 30; Halpin, *supra* note 40.

<sup>178</sup> Johnstone, *supra* note 131, at 292-293.

UNSC 1373 could overcome the two inherent obstacles to a law on cyberwarfare and then discusses the benefits and difficulties that would be faced regarding a resolution of this nature.

#### A. Characteristics of a Security Council Resolution on Cyberwarfare Using UNSCR 1373 as a Model

Any U.N. resolution attempting to combat cyberwarfare needs to balance a number of factors to ensure that it brings progress toward resolving cyberwarfare without creating legitimacy concerns due to the democratic deficit of the Security Council. The primary objective of a resolution would be to resolve the two previously discussed obstacles to an international structure to combat cyberwarfare: the lack of clarity surrounding the “use of force” in relation to non-kinetic attacks, and the challenges posed in attributing an act of cyberwarfare. Without resolving these issues, any Security Council resolution would fail.

The first challenge to adopting a Security Council resolution involves the lack of clarity in the law when an act of cyberwarfare is committed, something that passing a Security Council resolution would resolve fairly simply. The resolution would be automatically binding upon States and, therefore, would leave little doubt about how domestic laws should deal with cyberwarfare. In many respects the resolution would likely mirror UNSCR 1373 and UNSCR 1540. For instance, the language “all States shall” would impose the resolution on every U.N. party, forcing action by all States. Furthermore, it would not target any one culprit as do most Security Council actions. Finally, it would not expire, instead imposing an ongoing obligation on States. A resolution covering a contentious topic, applied to all States without a determined expiration date, such as this, would be legislative in character like UNSCR 1373 and UNSCR 1540. There are, however, more controversial obstacles to a resolution on cyberwarfare that would pose a challenge to its implementation.

A key challenge would be defining what an act of cyberwarfare constitutes. Without doing so, the law in relation to cyberwarfare will remain confused and leave uncertainty about what constitutes a punishable act. Defining cyberwarfare involves two steps: first, defining cyberwarfare itself, and second, identifying what will constitute an illegal act of cyberwarfare. One option for defining cyberwarfare would be to define it as any “computer network operation” undertaken by any State against another State, where a “computer network operation” is defined as an operation to attack, defend, or exploit

computers and computer networks.<sup>179</sup> This definition is broad, but leaves out some operations that might not be viewed as rising to the level of an attack, such as psychological operations, that are encompassed within the definition of “information operations.” As is often true in building unanimity during the creation of international law, reaching an agreement on a definition of cyberwarfare might be difficult. If this proves true, there is another option available. In many international law documents key terms are simply left undefined. One prominent example is the U.N.’s approach to terrorism, where many resolutions work to end terrorism, but do so without defining what precisely constitutes a terrorist act.<sup>180</sup> This would rely on the “I know it when I see it”<sup>181</sup> approach, recognizing that there is an inherent difficulty in distinguishing when an act of illegal cyberwarfare actually is such, and leaving it to a subsidiary body to determine the threshold for cyberwarfare on a case-by-case basis. Using this approach would not be as precise and would likely lead to more controversy, but would still establish the basic framework for combating cyberwarfare and assist in creating the public engagement required to begin the process of delegitimizing cyberwarfare. These are only two of many options available for defining cyberwarfare, but any resolution on the issue would help clarify the law on the subject.

Once defined, another question that would need resolution would be under what circumstances an act of cyberwarfare would constitute an unacceptable act. Cyberwarfare is a legitimate tool of warfare, so restrictions should not go so far as to make illegal an act of cyberwarfare during a traditionally recognized conflict between States. Cyberwarfare outside of open conflict, however, should be banned. Luckily, this is easily resolved by applying previously established LOAC. The resolution could rely on Common Article Two of the 1949 Geneva Conventions to determine when an act is or is not committed within a conflict.<sup>182</sup> By relying on the Geneva Convention, all

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<sup>179</sup> DOD DIR. 3600.01, *supra* note 20.

<sup>180</sup> The United Nations has long had difficulty in defining terrorism. See Renewed Effort Towards Completion of Comprehensive Convention Against Terrorism Applauded in Legal Committee GA/L/3340, Oct. 8, 2008. Yet, it still has passed many binding resolutions, such as S.C. Res. 1373 and S.C. Res. 1540, to attempt to thwart it.

<sup>181</sup> Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart J., concurring).

<sup>182</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them . . . . The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance . . . . Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”).

acts of cyberwarfare would be illegal except those committed during an "armed conflict" as defined in Common Article Two and which are otherwise consistent with the LOAC.<sup>183</sup> By using this established law, there would be no need to create a new standard for determining when an act is permitted within the bounds of an armed conflict, and when it is not.

Another challenge that a new resolution would face is determining when to require an investigation into an alleged act of cyberwarfare once an accusation of such an attack has been made by a State. As so many attacks on countries' systems are brought about by individuals not associated with a State, any Subsidiary Body (SB) created to investigate allegations of cyberwarfare could be overwhelmed by the sheer number of attacks that are leveled, unless they are able to filter out attacks by individuals. Furthermore, as the SB would likely lose political goodwill in implementing the resolution after too many unsuccessful investigations, it would be important to limit investigations to only those that meet some minimal threshold of gravity. Participating States would have to consider certain factors in narrowing the number of possible investigations that the SB could conduct against States. First, the accusing State would need to exhaust all its investigatory abilities and provide some reasonable basis for suspecting that the alleged act of cyberwarfare was committed by a State actor and not by an individual acting solely in his or her private capacity.<sup>184</sup> Second, the action would need to be one that has grave consequences for the peace and security, meaning it could lead to increased likelihood that a conflict between States would occur. While these questions relating to how a resolution would clarify the law on cyberwarfare are important, the more contentious question would revolve around the SB associated with the resolution.

### B. How a Security Council Subsidiary Body Would Function to Attribute Acts of Cyberwarfare

The truly unique characteristic of any Security Council resolution based on UNSC 1373 to combat cyberwarfare would be the Subsidiary Body (SB) created to implement the resolution. Addressing the issues outlined above would resolve the first roadblock to the cyberwarfare challenge by clarifying the legal inconsistency that exists now regarding cyber attacks. It would not, however, resolve the second important challenge facing a resolution of the problem: that any attribution made must link the State responsible for a cyber

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<sup>183</sup> *Id.*

<sup>184</sup> This function would have many of the characteristics of Article 17 of the Rome Statute that keeps the International Criminal Court from investigating a crime when a state is making a genuine investigation. (Rome Statute of the International Criminal Court Article 17, July 1, 2002, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>).

attack with the act itself. This is where an SB similar to the CTC would play a crucial role. The SB would act like the CTC in some respects, but would expand on its powers in important ways. In relation to cyberwarfare, it would play a dual role as compared to the CTC. First, it would work with States to implement domestic legislation to keep acts of cyberwarfare from occurring. This function would be similar to the CTC. The second function, however, would be an extension of power beyond what the CTC currently has: it would operate as a neutral investigative body, entering States when necessary to investigate alleged acts of cyberwarfare. When it finds a State in violation of the resolution, the SB would report the results to the Security Council, where the Council would then either dismiss a claim or declare it a threat to the “peace and security” under Article 39.<sup>185</sup>

Ascribing this type of authority to an international organization is not without precedent in international law. For example, the Chemical Weapons Convention lays out a detailed inspection regime to ensure the destruction of chemical weapons.<sup>186</sup> It is so detailed, in fact, that it requires that meals be provided for the inspection teams by the inspected State.<sup>187</sup> What makes the use of this authority unique, however, is ascribing it to a subsidiary body without going through the treaty-making process, thus not meeting the unanimity requirement of international law. This point cannot be understated, as allowing an investigative body to enter a State and assign responsibility regarding a breach of the peace and security is a very intrusive action. To do so without unanimous consent among all States is something that could be very controversial. This is not to say, however, that States would not allow it. The benefits of having legal recourse against States that intrude on their own computer networks might be sufficient to persuade States to accept the SB’s authority. Furthermore, States have had the opportunity to become accustomed to the broader reach of the Security Council through UNSCR 1373 and UNSCR 1540, making this type of exertion of power more acceptable, when used to reduce a common threat to the international community.

The NPT is another treaty that has established an investigation regime, and provides an example of how the SB could work in practice. The NPT breaks the world into two categories: those States with nuclear weapons, and those without.<sup>188</sup> The treaty attempts to limit the proliferation of nuclear weapons in those States without them already.<sup>189</sup> A difficult goal of the NPT is

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<sup>185</sup> U.N. Charter art. 39, *supra* note 79.

<sup>186</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction part II, Apr. 29, 1997, 15 C.F.R. § 710, 1015 U.N.T.S. 163.

<sup>187</sup> *Id.* at part II, para. 26.

<sup>188</sup> Non-Proliferation of Nuclear Weapons Treaty, Mar. 4, 1970, 22 U.S.C. § 3201, 729 U.N.T.S. 161.

<sup>189</sup> *Id.*

ensuring that all nations have access to peaceful uses of nuclear materials while ensuring that those materials do not become weaponized.<sup>190</sup> To allow peaceful uses while ensuring that no nuclear materials end up being used for military purposes, the Treaty establishes “safeguards” to guarantee that nuclear materials are only used for peaceful means.<sup>191</sup> The Treaty requires each party to accept these safeguards “set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency (IAEA) . . . for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty.”<sup>192</sup> To date, 145 States have entered a Safeguard Agreement with the IAEA.<sup>193</sup>

The IAEA has a Model Safeguard Agreement that lists three different types of investigations that States are to allow the IAEA to undertake.<sup>194</sup> The first are “*ad hoc*” investigations, used to verify information from a State’s initial report, to verify changes in a site’s situation since the filing of the initial reports, and to verify the quantity of nuclear materials meant to be transferred to another State.<sup>195</sup> The second type are “routine” investigations, used to verify that reports and records are consistent, verify the location, composition, and quantity of nuclear materials, and to verify why some materials might be unaccounted for.<sup>196</sup> The third type are “special” investigations, used to verify any inconsistencies the IAEA might receive from the other two forms of investigations.<sup>197</sup> These three types of investigations are fairly restrictive, as they limit the scope of investigations mostly to known sources of nuclear material.<sup>198</sup> The IAEA has recently added a new tool to strengthen its safeguards for investigation when the Agency suspects that a State has undeclared nuclear materials. The Agency uses an Additional Protocol, which must be ratified separately by States that have signed Safeguard Agreements, to allow access to more information regarding a State’s nuclear activities, and

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<sup>190</sup> *Id.* at preamble (“Affirming the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States.”).

<sup>191</sup> *Id.* at art. III.

<sup>192</sup> *Id.*

<sup>193</sup> IAEA Safeguards: Stemming the Spread of Nuclear Weapons, FS Series 1/02/E, 2001, available at [http://www.iaea.org/Publications/Factsheets/English/S1\\_Safeguards.pdf](http://www.iaea.org/Publications/Factsheets/English/S1_Safeguards.pdf).

<sup>194</sup> The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INF/CIRC/153(Corrected), June 1972, available at <http://www.iaea.org/Publications/Documents/Infrcircs/Others/infrcirc153.pdf>.

<sup>195</sup> *Id.* at 18.

<sup>196</sup> *Id.* at 18-19.

<sup>197</sup> *Id.* at 19.

<sup>198</sup> *Id.* at 19-20.

gives greater rights of access to investigators.<sup>199</sup> Additional Protocols have been signed by 127 parties and ratified by eighty-eight of them.<sup>200</sup>

The NPT, as an example of a successful investigatory regime, is important to this discussion for two reasons. First, it shows States' willingness to become parties to agreements that actively restrict their rights to weapons that most would prefer to have. Regarding nuclear weapons, States have many reasons for signing the NPT; some are altruistic, with the desire to live in a nuclear-free world, while others are not. Many States likely see the NPT as an opportunity to limit their own enemy's abilities to develop a costly weapon, thus reducing their need to spend the money and risk the consequences of developing their own nuclear weapons in defense. This same concept could be at play in relation to cyberwarfare, as States that believe their enemies will not prematurely attack their networks due to the international law in place would be less likely to take the risk of attacking another State. The wide acceptance of the NPT's inspection regime, and the existence of relatively few cases where States disregard their responsibilities to NPT investigation teams,<sup>201</sup> prove that the NPT model could be successful if applied to cyberwarfare.

The second reason the NPT is important in relation to cyberwarfare is that a similar version of its investigatory regime could be implemented through a Security Council resolution to combat cyberwarfare. The authority that a SB established under a resolution on cyberwarfare would need is fairly basic, and the process created to implement an investigation could provide a number of checks on the SB's and Security Council's powers. The process would begin with a State making a formal complaint to the SB under the Security Council resolution on cybercrime.<sup>202</sup> The SB would begin by reviewing the complaint to establish its reasonableness. The accused State would then have the opportunity to respond and provide evidence clearing itself of guilt. If the SB had any lingering doubt, however, it would have the right to enter the accused State to undertake a more thorough investigation. After an investigation is complete, the body would report its findings to the Security Council, leaving the Council with a second review of the complaint, and final authority regarding the application of a penalty.

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<sup>199</sup> Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corrected), Sept. 1997, available at <http://www.iaea.org/Publications/Documents/Infircs/1997/infirc540c.pdf>.

<sup>200</sup> Strengthened Safeguards System: Status of Additional Protocols (Oct. 9, 2008), [http://www.iaea.org/OurWork/SV/Safeguards/sg\\_protocol.html](http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html).

<sup>201</sup> See S.C. Res. 1803, *supra* note 14.

<sup>202</sup> See generally Rome Statute of the International Criminal Court, *supra* note 184, at Art. 14. This function would perform much like Article 14 of the Rome Statute giving authority to a State to refer a complaint to the International Criminal Court.

This process for investigating a claim of cyberwarfare would resolve many of the problems associated with regulating cyberwarfare. First, only the most serious claims would be investigated, ensuring that States and the SB would not infringe on the various domestic and international laws regarding cybercrime or cyberterrorism. Furthermore, a claimed-against State would have multiple opportunities to defend itself to the SB and the Security Council, and a high burden of proof for any claim would be placed on a claiming State, providing sufficient process to assuage concerns about any abuse of authority. Most importantly, this process would resolve the lack of clarity in international law relating to cyberwarfare, thus eliminating incentives for acts of cyberwarfare. The end result would be that States could operate without fear of constantly having to defend themselves to the Security Council, or have their territory investigated by the SB because of arbitrary claims, or worry about cyber attacks without recourse.

### C. The Ramifications of a Security Council Resolution on Cyberwarfare

Passing a Security Council resolution on cyberwarfare brings with it many benefits as well as obstacles. The benefits of such a resolution would be fairly immediate: at the point of its passage, the law surrounding cyberwarfare would become clear, and would drastically reduce States' options when attempting to intrude on another State's information systems. Another benefit would be the creation of a neutral body, detached from any single State's influence, that would have the authority to undertake investigations. This is far more efficient than an alternative model that might allow the State which has been attacked to enter the attacker's territory to undertake an investigation. The latter model would have no legitimacy due to the clear conflict of interest in their investigation and lack of neutrality. A final benefit of such a resolution would hopefully be a reduction in cyber attacks, followed by reduced tensions in the world.

While the benefits certainly provide optimism, there would be many challenges to such a resolution. A first important challenge to passage would be the veto power of the Permanent Five members of the Security Council. There are at least three permanent members, the U.S., China, and Russia, who are heavily involved in cyber activities.<sup>203</sup> It is unclear how they would react to a resolution that might challenge their authority to act within cyberspace. It is certainly plausible that these States might view a resolution as infringing too far into State sovereignty for a couple of reasons. First, these States may see the circumvention of the treaty-making process as overstepping the authority of the

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<sup>203</sup> See Halpin, *supra* note 39 (regarding Russia); Mulvenon's Statement on China's Proliferation, *supra* note 44 (regarding China); Berg, *supra* note 48 (regarding the U.S.).

Security Council. Second, they might view an investigatory regime as intruding too deeply into sovereignty. This is however by no means certain. The Permanent Five might view a resolution as a welcomed method to resolve what is likely to be a major international problem. Considering the Council's new willingness to expand the methods used to protect the "peace and security,"<sup>204</sup> how the Permanent Five might react to such a resolution remains an open question.

Many States other than the Permanent Five might object to a resolution on grounds of the democratic deficit accorded to the Security Council. This is certainly a legitimate concern, but not one that would absolutely prevent a resolution. Nothing in a resolution would keep States from seeking a solution to cyberwarfare issues through the treaty-making process. Considering, however, the often lengthy amount of time required for a treaty to enter into force, a Security Council resolution could be used in the interim as a gap filler. In doing so, it would create an institution in the SB that could build institutional knowledge on the issues and challenges regarding cyberwarfare issues, which then could be used to enforce any treaty that would be agreed upon later. Furthermore, past resolutions have somewhat assuaged the democratic deficit concerns by implementing an extremely inclusive deliberation process when drafting the legislation of a Security Council resolution.<sup>205</sup> The Council would need to take extra care to include States that show concern regarding a resolution on cyberwarfare, to soothe concerns over the deeper intrusion it would make into the internal sovereignty of States.

Even if a resolution were to pass, States might resist passing implementing legislation, or they might even refuse a request for an investigation on the grounds that the Security Council has overstepped its bounds. Enforcement issues, however, are always a concern within international law. While the NPT works most of the time, there are certainly parties that choose to turn back inspectors at times.<sup>206</sup> This, however, does not mean the treaty has not had an important impact on the psychology surrounding nuclear weapons. The same might be true of a resolution on cyberwarfare. Any State that would deny implementing the resolution would only bring further scrutiny on its actions and raise international awareness of the problem, all while the customary effect of the resolution grows.

A final challenge the resolution might face involves its practical implementation relating to the effective implementation of the SB. To be at all effective, the SB would have to create a clear process for filtering out claims of

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<sup>204</sup> Malone, *supra* note 115.

<sup>205</sup> Johnstone, *supra* note 131, at 292-293.

<sup>206</sup> S.C. Res. 1803, *supra* note 14.

cyberterrorism or cybercrime that originate from individuals, and claims of cyberwarfare originating from States, all while ensuring that claims of cyberwarfare have a significant enough impact on the State to necessitate an investigation. If the SB is not capable of defining a seriousness threshold, it would become overwhelmed by the sheer number of investigations. In attempting to investigate too many problems, hoping to further promote the purpose of the Resolution, the SB could easily reduce its own effectiveness. Therefore the SB must assemble a body of experts in the field of cyber security early to ensure the SB creates effective procedures to implement its purpose.

#### V. CONCLUSION

A resolution to address cyberwarfare would touch at the sensitive center of international law development today. Former Secretary of Homeland Security Michael Chertoff argued for the need to return to an international system where State consensus is at the center of international law.<sup>207</sup> The counterargument to his statement is that some challenges are of such an international character, and evoke such an immediate demand for action, that consensus cannot be met before a grave threat to the entire world could unfold. In such a case, the international community should act swiftly to meet those challenges. Cyberwarfare is such a case, as it demands immediate action from the international community. The recent acts of cyberwarfare committed against Georgia and Estonia have shown the world a glimpse of the future of cyber conflict and the impact cyberwarfare can play in disrupting the peace and security of the world. Whether because the victims were small States, or because the international community has yet to understand difficulties associated with cyberwarfare, these conflicts have not thus far engaged the international community in finding a solution regarding future acts of cyberwarfare. Continuing to ignore the unique characteristics of cyberwarfare may well lead to a catastrophe without any immediate remedy. Instead of allowing this to happen, the international community should take action to head off any future conflict before it begins.

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<sup>207</sup> Michael Chertoff, The Responsibility to Contain: Protecting Sovereignty Under International Law, FOREIGN AFFAIRS, January/February 2009.

# BETRAYING OUR TROOPS: THE DESTRUCTIVE RESULTS OF PRIVATIZING WAR<sup>1</sup>

Major Thomas B. Merritt, Jr., USMC<sup>2</sup>

## I. INTRODUCTION

The issue of private contractors running amok in Iraq has been seized upon by the popular press.<sup>3</sup> Even to unsophisticated readers working outside of the defense or procurement establishments, this book presents what is likely a somewhat familiar topic. The authors build their case using firsthand accounts detailing the waste, inefficiency, and at times, sheer recklessness of private contractors operating in Iraq. They attempt to weave together a clear message from a series of disparate accounts provided by servicemembers, logistics contractors, and security contractors along with an overview of the politics involved.<sup>4</sup> From these sources, the authors seek to “illustrate that the Army cannot adequately supply the troops on the battlefield using contractor support.”<sup>5</sup> At the heart of the authors’ thesis is what they perceive to be an inherent incompatibility of private industry’s goals (i.e., maximizing profit for shareholders) and those of the military (i.e., battlefield success).<sup>6</sup>

By taking on the critical issue of government waste, the authors seek to further a noble cause, namely the prevention of waste and abuse in military procurement; unfortunately, the result falls well short of the mark. For those unfamiliar with the role of military logistics in combat operations and with the increased responsibilities on the battlefield now assumed by private contractors, this book attempts to use a series of personal accounts to first educate the reader on the relevant issues – and at times the personalities of the key players and the political landscape – and then sway him or her to the authors’ camp. However,

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<sup>1</sup> DINA RASOR & ROBERT BAUMAN, BETRAYING OUR TROOPS: THE DESTRUCTIVE RESULTS OF PRIVATIZING WAR (2007).

<sup>2</sup> U.S. Marine Corps. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center and School (TJAGLCS), U.S. Army, Charlottesville, Va.

<sup>3</sup> See, e.g., Dana Hedgpeth, *Spending On Iraq Poorly Tracked; Audit Faults Accounting for \$15 Billion in Work*, WASH. POST, May 23, 2008, at D1; Eric Schmitt, *Guilty Plea Given in Iraq Contract Fraud*, N.Y. TIMES, Jun. 11, 2008, at A10; Griff Witte & Renae Merle, *Contractors Face More Scrutiny, Pinched Purses, Democrats Vow to Examine Large Deals*, WASH. POST, Nov. 28, 2006, at D1.

<sup>4</sup> RASOR & BAUMAN, *supra* note 1, at vii–ix.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 8.

the chapters of the book are ineffectively fused together, the various personal accounts resonate as disjointed, and the authors mechanically state and restate their conclusions and position with such frequency that the reader is ultimately left numb to their arguments as well as dissatisfied.

*Betraying Our Troops: The Destructive Result of Privatizing War* has three primary weaknesses. Its first weakness is a heavy reliance on personal accounts to make the authors' arguments. Second, it appears to have been written, in part, as a means of encouraging *qui tam* actions under the Federal False Claims Act and drawing potential whistleblowers to the authors' consultancy. Third, it has numerous editorial deficiencies. The book's only significant strength is its call for reform in the use of private security contractors in Iraq.

## II. BACKGROUND AND CONTEXT

Both authors claim extensive backgrounds in government waste and procurement fraud investigation, and are partners in a consulting firm, founded to support whistleblowers, called the Bauman & Rasor Group.<sup>7</sup> Rasor has more than 25 years of experience exposing and combating government procurement fraud.<sup>8</sup> During this period she worked as a journalist and as an investigator.<sup>9</sup> She wrote the book *Pentagon Underground* in 1985 and co-wrote the whistleblower's manual *Courage without Martyrdom: A Survival Guide for Whistleblowers* in 1989.<sup>10</sup> In addition, Rasor is the founder of the Project On Government Oversight or "POGO" (formerly known as the Project on Military Procurement). Bauman, a former Department of Defense procurement fraud investigator with 24 years of service, has worked as a consultant since leaving government employment.<sup>11</sup> He is also a member of the Association of Certified Fraud Examiners.<sup>12</sup>

Despite the significant experience and numerous accomplishments of the authors, there is no information provided on their educational backgrounds, academic achievements or credentials. This information is notably absent from their biographies both in the book and on their consultancy's website. Both authors have dedicated the bulk of their careers to rooting out procurement fraud and government waste in its various forms, and as a predictable result, the

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<sup>7</sup> Bauman & Rasor Group, Inc., <http://www.quitam.com/id1.html> (last visited Jun. 8, 2009).

<sup>8</sup> Dina Rasor, <http://www.quitam.com/id19.html> (last visited Jun. 8, 2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Robert H. Bauman, CFE, <http://www.quitam.com/id18.html> (last visited Jun. 8, 2009).

<sup>12</sup> *Id.*

message of *Betraying Our Troops: The Destructive Result of Privatizing War* is undeniably one-sided.

### III. OVERRELIANCE ON PERSONAL ACCOUNTS

One of the most obvious limitations of basing this book largely on the personal accounts of a relatively small number of individuals is the possibility that these accounts are either exaggerated or provided by a disgruntled or otherwise dissatisfied minority as opposed to a broader, more objective method of collecting data. In this vein, the authors get drawn into lengthy discussions regarding tensions or perceived disparities between contractor employees and their management as well as perceived disparities between enlisted military personnel and their officers.<sup>13</sup>

The authors' position regarding the dangers of using contractors to satisfy critical military requirements, and the associated fraud, waste, and inefficiency is a clear and consistent theme throughout the book. The means of relating it to the reader, however, (primarily using personal accounts) often proves to be a distraction, and the reader is left questioning the accounts' reliability. For example, the contractor employees providing the authors with personal accounts grouse about their company's culture of greed or its focus on profit, while they sheepishly admit that they sought their positions for financial gain.<sup>14</sup> Many of the personal accounts compiled and presented by the authors appear to come from a small, vocal minority of contractor personnel who feel wronged in some fashion. For example, each of the contractor employees providing accounts on waste and abuse had complaints that they felt were not adequately addressed by their managers.<sup>15</sup> Other recent works on the subject of contractors in war zones, such as James J. Carafano's *Private Sector Public Wars: Contractors In Combat Afghanistan, Iraq, and Future Conflicts*, provide a critical discussion of relevant issues, including fraud and the heavy-handed techniques of armed security contractors, without an overreliance on personal accounts.<sup>16</sup>

The allegations of fraud and excess described in Chapter 12 of the book are based entirely on the account of a contractor employee whose judgment was so laughably poor that he brought his 14-year-old son from Montgomery, Alabama to Baghdad to stay with him in September 2003.<sup>17</sup> The employee had

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<sup>13</sup> See, e.g., RASOR & BAUMAN, *supra* note 1, at 17, 62.

<sup>14</sup> See *id.* at 12, 59–60, 146.

<sup>15</sup> See *id.* at 44, 67.

<sup>16</sup> See JAMES J. CARAFANO, PRIVATE SECTOR PUBLIC WARS: CONTRACTORS IN COMBAT AFGHANISTAN, IRAQ, AND FUTURE CONFLICTS (2008).

<sup>17</sup> RASOR & BAUMAN, *supra* note 1, at 90 (stating that “. . . he was afraid that during his long absence his wife and three daughters would make the boy into too much of a sissy”).

concluded that “as long as [he and his son] stayed at [Baghdad International] [A]irport and he was armed, the boy would be reasonably safe.”<sup>18</sup> Amazingly, he balked when his employer requested that the boy leave Iraq.<sup>19</sup> Inevitably, any other information or insight provided by this source is immediately suspect in the eyes of the reader. The discussion of the employee’s various allegations against his former employer is sufficiently questionable that it ultimately adds nothing to the book and should have been removed prior to publication.

More vexing is the fact that the authors, neither of whom has served in the military, have a simplistic view of military life and paint the American Soldier as a weak-willed complainer.<sup>20</sup> The authors are apparently shocked by what they call the

. . . huge disparity between the Green Zone [in Baghdad] and the remote bases, where soldiers had to put up with eating MREs or other types of basic food, while those in the Green Zone enjoyed gourmet meals and the rich desserts of highly paid pastry chefs. Contractor bus drivers shuttling people around the Green Zone were paid far more than soldiers risking their lives on patrol in the other sectors of [Baghdad], sweltering in the 120-degree heat.<sup>21</sup>

And the authors seem genuinely surprised that “[Soldiers assigned to checkpoints are] posted in obscure areas next to dusty roads for weeks at a time with just a few Humvees, MREs, water, and primitive tent shelters.”<sup>22</sup> Instead of expressing admiration for these servicemembers whose duties require them to live in Spartan, often dangerous, conditions or to make do with less, the authors attempt to impose their own notions of civilian equality on an institution that they fail to fully understand. This has the unfortunate effect of diluting the sacrifice made by these servicemembers in the eyes of the reader.

#### **IV. STIRRING UP QUI TAM ACTIONS UNDER THE FEDERAL FALSE CLAIMS ACT**

It is difficult to categorize this book. Based on the backgrounds of the authors and their affiliation with an organization dedicated to supporting corporate and government whistleblowers, this book is not only a vehicle for supporting their anti-fraud / pro-government oversight agenda, but also a way to

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 90–91.

<sup>20</sup> See *id.* at 72–73.

<sup>21</sup> *Id.* at 75.

<sup>22</sup> RASOR & BAUMAN, *supra* note 1, at 57.

encourage others with knowledge of procurement fraud to come forward and to contact the authors. To this end, the authors' consulting group sponsors a project, known as the "Follow the Money Project," to assist potential plaintiffs in pursuing actions under the *qui tam* provisions of the Federal False Claims Act (the Act).<sup>23</sup> The authors, Rasor and Bauman, are the Director and Deputy Director respectively of the Follow the Money Project.<sup>24</sup> The Act allows for civil penalties and treble damages against those who present false claims for payment to the government.<sup>25</sup> In a novel twist, the Act also allows payment of an award of "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim" to a private person initiating a claim on behalf of the government.<sup>26</sup> The Act has some significant restrictions on the types of actions that may be brought. Specifically, actions relating to the Internal Revenue Code are excluded.<sup>27</sup> Further, actions by current or former members of the armed forces against a member of the armed forces arising out of such person's service in the armed forces are barred.<sup>28</sup> Both of these limitations have the effect of significantly reducing the number of cases eligible for *qui tam* treatment under the Act.

As described, *Betraying Our Troops: The Destructive Result of Privatizing War* appears designed to further the authors' "Follow the Money Project" by raising the awareness of prospective whistleblower clients, while seeking to draw them into the authors' consultancy. The results of this will likely leave readers feeling somewhat alienated and dissatisfied.

## V. EDITORIAL DEFICIENCIES

The editing of *Betraying Our Troops: The Destructive Result of Privatizing War* is surprisingly poor and proves a constant source of distraction for the reader. The errors span throughout the book and range from simple grammar and punctuation mistakes to the sloppy and haphazard use of key terminology relevant to the authors' arguments. One glaring editorial error has a contractor's employee ". . . complain[ing] to managers many times over the waste and efficiency [sic] he observed."<sup>29</sup> In two other examples, the authors erroneously refer to the "Federal Acquisition Requirements (FARs)" (instead of

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<sup>23</sup> See Follow the Money Project, <http://www.followthemoneyproject.org/id1.html> (last visited Jun. 8, 2009); 31 U.S.C.A. §§ 3729–3731 (Lexis 2009).

<sup>24</sup> Follow the Money Project, <http://www.followthemoneyproject.org/id1.html> (last visited Jun. 8, 2009).

<sup>25</sup> See 31 U.S.C. § 3729 (1)–(7).

<sup>26</sup> 31 U.S.C. § 3730(b), (d).

<sup>27</sup> 31 U.S.C. § 3729(e).

<sup>28</sup> 31 U.S.C. § 3730(e)(1).

<sup>29</sup> RASOR & BAUMAN, *supra* note 1, at 44.

“Federal Acquisition Regulations”<sup>30</sup> and discuss a bill to increase competition by eliminating “sole-course contracts” (instead of “sole-source contracts”).<sup>31</sup> Viewed collectively, at worst these errors call into question the depth of the authors’ claimed experience in the area of government procurement fraud; at best, they show that little care was put into the editing of this work and that it may have been rushed to press.

## VI. PRIVATE SECURITY CONTRACTORS IN IRAQ

In addition to criticizing the shortfalls of the logistical support provided by civilian contractors, *Betraying Our Troops: The Destructive Result of Privatizing War* provides a separate discussion regarding the shortfalls of private security contractors in Iraq.<sup>32</sup> Sadly, recent history has validated the authors’ early call for reform in this area and this is the only topic covered where the authors effectively and genuinely addressed important issues.

Although the book was published in 2007, it appears to have gone to press before the widely-reported incident on September 16, 2007 involving employees from Blackwater USA (now known as “Xe”) firing on Iraqi civilians in Nisoor Square in Baghdad, killing more than a dozen and wounding many others.<sup>33</sup> Many of the issues the authors raised in the book regarding the reckless conduct of security contractors (“Corporate Cowboys in a War Zone”) have proven eerily correct in light of the Nisoor Square killings.<sup>34</sup> Although the full impact of the Nisoor Square incident remains to be seen, additional regulation and increased oversight of security contractors – as called for by the authors – appears to be a likely outcome.

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<sup>30</sup> *Id.* at 85.

<sup>31</sup> *Id.* at 178.

<sup>32</sup> *See id.* at 83–92, 99–128.

<sup>33</sup> *See* James Glanz & Sabrina Tavernise, *Blackwater Role In Shooting Said To Include Chaos*, N.Y. TIMES, Sep. 28, 2007, at A1; Joshua Partlow & Sudarsan Raghaven, *Iraq Probe of U.S. Security Firm Grows; Blackwater Accused of Killing 11 on Sunday, Cited in Earlier Deaths*, WASH. POST, Sep. 22, 2007, at A1; Sudarsan Raghaven, Joshua Partlow & Karen DeYoung, *Blackwater Faulted In Military Reports From Shooting Spree*, WASH. POST, Oct. 5, 2007, at A1; Sabrina Tavernise & James Glanz, *Iraqi Report Says Guards for Blackwater Fired First*, N.Y. TIMES, Sep. 19, 2007, at A12.

<sup>34</sup> *See* RASOR & BAUMAN, *supra* note 1, at 127, 239 (noting that the “uncontrolled cowboy tactics” of civilian security contractors often alienated the local populace thereby making life more difficult for U.S. troops); *see also* JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* (2007) (providing a detailed and critical history of Blackwater USA); CARAFANO, *supra* note 19, at 107 (discussing the Nisoor Square incident).

**VII. CONCLUSION**

This book is not a scholarly work. Rather, it is a lengthy pamphlet prepared to further the authors' clearly stated agenda. It does not attempt to provide a balanced discussion of the issues. Its authors are investigators, not procurement professionals or members of the military. The authors' use of procurement-related terminology and military jargon is, at times, forced and unnatural (there are, however, some helpful definitions of key terminology and concepts in the book's detailed appendix).

The strength of this book is its personalization of the stories of waste and abuse that might make headlines but lack a human dimension. Weaving these personal accounts into one coherent theme is where the authors fall short. In their effort to gel these accounts, they resort to repetition and allow their tone to become shrill and desperate. The chapters of this book should have been published as separate articles or as pamphlets for distribution to the mailing list of the authors' consultancy. The individual parts are more valuable than the whole.

# KINGMAKERS: THE INVENTION OF THE MODERN MIDDLE EAST<sup>1</sup>

Major Sondra M. Smith, USA<sup>2</sup>

*Sages through the ages have agreed on the futility of seeking to recapture, fully grasp, deal objectively with, or learn from things past. To the Hellenic philosophers in ancient Asia Minor, time was a river in whose waters one could never step twice. To Thomas Carlyle, history was little more than a distillation of rumors, while to the less famous but oft-cited British author L. P. Hartley, the past was a foreign country where they did things differently. To America's acerbic, nay-saying Ambrose Bierce, history was an account, mostly false, of unimportant events brought about by rulers, mostly knaves, and soldiers, mostly fools. Indeed one has to be jejune or an ideologue to believe the past predetermines the future, otherwise, every stock trader would be rich. Nevertheless, common sense and simple prudence argue the value of looking backward for danger signs, much as a sailor approaching a new coastline would want to know the location of likely reefs and previous shipwrecks.<sup>3</sup>*

*Kingmakers* is a colorful collection of biographical portraits of several British colonial and contemporary American meddlers — politicians, soldiers, writers and spies — who through their attempts to court or conquer the Middle East for their sovereigns — governmental and commercial — shaped the Middle East of today.

*Kingmakers* vividly illustrates the historical nexus between the present and the past. The parallels between British colonialism and recent American involvement in the Middle East are undeniable. It becomes evident how vitally important understanding history is to fully comprehending the United States' current dilemma in Iraq. In bringing together the histories of these kingmakers, a cautionary tale unfolds about how the greatest of empires can teeter and fail.

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<sup>1</sup> KARL E. MEYER & SHAREEN BLAIR BRY SAC, KINGMAKERS: THE INVENTION OF THE MODERN MIDDLE EAST (2008).

<sup>2</sup> Tennessee Army National Guard. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army, Charlottesville, Va.

<sup>3</sup> MEYER & BRY SAC, *supra* note 1, at 411.

The authors, Karl E. Meyer and Shareen Blair Brysac, scoured public archives and private papers and consulted an extraordinary number of resources<sup>4</sup> to “retell the history [of the Middle East] through the medium of individuals.”<sup>5</sup> Karl E. Meyer is a successful journalist whose career spans more than sixty years. He has been the senior foreign affairs writer on the editorial boards of both the *Washington Post* and the *New York Times* and is currently the editor-at-large for the *World Policy Journal*, published quarterly by the World Policy Institute. Meyer holds a Masters in Public Affairs and a Ph.D. in Politics from Princeton University. In addition to recent articles on the Middle East and religion, Meyer co-wrote with Shareen Blair Brysac, a former producer for CBS News and recipient of several Emmy and Peabody awards, *The Dust of Empire* and *Tournament of Shadows* which, along with *Kingmakers*, forms a highly acclaimed trilogy with the theme of empire building.

*Kingmakers* “encapsulate[s] a century’s worth of misjudgment, overreach and catastrophe”<sup>6</sup> and provides fascinating insight into the region and the events set in motion by the kingmakers; however, it can be a difficult read. *Kingmakers* is detailed to a fault. Even though each chapter is packed with a treasure trove of colorful anecdotes and facts which bring to life the people and their times, the complexity of the stories and extravagant and sometimes superfluous detail make it cumbersome to follow. Adding to the struggle is the authors’ apparent affection for turgid language – requiring the average reader to spend considerable time with the dictionary.

Additionally, the authors, at times, lose their central character and go on protracted tangents. The reader is often introduced to an individual in a circuitous fashion through the lives of several others. Only after extensive reading does the reader arrive at the main character when the stories merge. Too often, the reader is lost in a jumble of people, places, events and extraneous detail. For the history novice, it may be necessary to consult outside resources to follow the trail.

Lastly, there is little continuity in the authors’ style from chapter to chapter. In the chapter “The Frenzy of Renown,” the authors set out to address three specific questions<sup>7</sup> about T.E. Lawrence, the answers to which have nothing to do with the theme of *Kingmakers*. In fact, a good portion of this chapter focuses on the Hollywood film, “Lawrence of Arabia.”<sup>8</sup> Later, in “A

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<sup>4</sup> See *id.* at 437– 65 (listing almost nine hundred endnotes), 467– 83 (providing a bibliography consisting of archives, books and academic journals).

<sup>5</sup> *Id.* at 18.

<sup>6</sup> Daniel Okrent, *Desert Sons*, FORTUNE, Aug. 18, 2008, at 52.

<sup>7</sup> MEYER & BRY SAC, *supra* note 1, at 196.

<sup>8</sup> LAWRENCE OF ARABIA (Horizon Pictures 1962).

Splendid Little Army,” the authors cite, in an academic manner, six reasons why Pasha Glubb deserves a dedicated chapter.<sup>9</sup>

Despite its shortcomings, *Kingmakers* is interesting and provides far better insight than a country study into the historical impact of Western involvement in Africa and the Middle East and the legacy of colonialism with which the United States must now deal.

*Kingmakers* first introduces the reader to British colonialists each of whom, a “New Imperialist,” played a role in spreading British “indirect rule” throughout the Empire. There was Sir Evelyn Baring, Proconsul of Egypt for twenty-seven years, who believed “the Empire stood for peace, free trade, and a rule of law: in backward lands, it inculcated love of liberty and fair play: its commercial policies benefited rich and poor alike; and its opponents were either envious rivals . . . or mad mullahs . . . .”<sup>10</sup> “Over Baring,” as he was known, didn’t feel he could trust the Arabs because they were not logical thinkers, not properly educated or, if they were properly educated, were trouble makers. Egyptians would tolerate another almost fifty years of British humiliation before Britain’s last puppet, King Farouk, was deposed in a military coup.

Next, Meyer introduces Flora Shaw, Colonial Editor of *The Times of London* and mouthpiece of New Imperialism during the 1890s.<sup>11</sup> As a close associate of Cecil Rhodes, she supported him and his expanding empire through her articles and editorials and helped promote Rhodes’ brand of robust imperialism, defined by him as “philanthropy plus five percent.”<sup>12</sup> It was Shaw who would name Nigeria, the country over which her future husband, Lord Lugard, would govern.

Lord Lugard was Britain’s greatest proponent of indirect rule. Lugard’s policy, followed by his successors, laid the foundations for the continual internal strife in Nigeria that exists to this day.<sup>13</sup> His theory of “Indirect Rule” evolved into the corrupt practice adhered to by other Imperialists and referred to as the “rent a sheik, buy an emir strategy.”<sup>14</sup>

Gertrude Bell, another influential female colonial, was a key player at the 1921 Cairo Conference. There she, along with other top British Middle East experts such as T.E. Lawrence, settled the terms of the British Mandate in Iraq

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<sup>9</sup> MEYER & BRYSAC, *supra* note 1, at 264.

<sup>10</sup> *Id.* at 34.

<sup>11</sup> *See id.* at 66.

<sup>12</sup> *Id.* at 73.

<sup>13</sup> *See id.* at 93.

<sup>14</sup> MEYER & BRYSAC, *supra* note 1, at 93.

and chose a Hashemite, Faisal ibn Husayn, for the throne of Iraq. As Colonial Secretary – a position of power second only to the Chief Administrator – Bell spent much of her time visiting with tribal leaders. Ironically, and despite the political urgency to consult the Grand Ayatollah Sayyid Ismail al-Sadr who controlled the holy cities of Najaf and Karbala, Bell chose to forego a visit on principle: “she had been ‘cut off from them because their tenets forbid them to look upon an unveiled woman and [her] tenets [didn’t] permit [her] to veil.’”<sup>15</sup> As fate would have it, the present-day American nemesis, Muqtada al-Sadr, is the grandson of the Grand Ayatollah that Bell ignored. Had she established relations with this Shia, the future for the British and Americans may have turned out differently.

*Kingmakers* then looks at the several contemporary American spies whose “games” in the Middle East built upon those of the British and helped further perpetuate the anti-western sentiment that exists there today. The first American kingmaker in the Middle East was Miles Copeland. He was the first Central Intelligence Agency operative to bring about a regime change.<sup>16</sup> This he did in Syria in 1949. The result was to bring to power a colonel who reigned for six months. He was then disposed, setting off a firecracker chain of coups and courements ultimately culminating with the Assad Dynasty currently in power.

Another instrumental spy was Kermit Roosevelt, grandson of President Theodore Roosevelt. With some keen maneuvering and \$100,000, he brought down Mossadeq, the legitimate ruler of Iran. In 1952, after Mossadeq nationalized Iranian oil, Operation Ajax was hatched to overthrow him. The United States had no interest in protecting British oil. However, the British convinced the United States that if it didn’t get rid of Mossadeq, the communist Tudeh Party, backed by the Russians, would take control. The operation was ultimately successful, setting the stage for distrust towards the United States. “For many Iranians, among them Ayatollah Ruhollah Khomeini, the thread of memory led clearly from the Great Game to the Great Satan.”<sup>17</sup>

Lastly, *Kingmakers* examines Deputy Secretary of Defense Paul Wolfowitz and asks how, despite his education, experience and insight, “he never addressed the aftermath of the war he was instrumental in promoting.”<sup>18</sup> Was he guilty of seeing things as he wanted them to be and not as they truly were? Was he misled by his own experience in Indonesia and the Philippines where authoritarian regimes smoothly gave way for democracy? How could he not see that Iraq was different – that change in Iraq was not to be brought about

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<sup>15</sup> *Id.* at 174.

<sup>16</sup> *Id.* at 356.

<sup>17</sup> *Id.* at 347.

<sup>18</sup> *Id.* at 406.

by allies from within but rather imposed from without by influential, self-serving Iraqi exiles using Washington as their instrument of change?

These were but a few of the kingmakers.

All were instrumental in building nations, defining borders, and selecting or helping to select local rulers. nearly [sic] all risked life and health to promote what they perceived as civilizing values. Nonetheless, after more than a century of Western assertiveness, peace remains elusive, sectarian passions are virulent, and with few exceptions the region's ordinary citizens have failed to profit from the petroleum windfall.<sup>19</sup>

*Kingmakers* is a must-read for foreign policy makers and military strategists alike. It brings to light how events of the past are repeating themselves today as the United States struggles, politically and militarily, in the Middle East.

The issues that this country is now debating – how to exit Iraq gracefully, how to protect American interests in the region after withdrawal, how to keep Arab insurgencies in check, how to continue the essential flow of oil, how to maintain American presence without the appearance of colonialism or occupation – these issues have all been addressed before.<sup>20</sup>

Meyer and Brysac point out the striking similarities between British occupation in the interwar period and present U.S. involvement in Iraq. “Both nations, having won a victory they did not really know what to do with, have found themselves with new and even greater responsibilities in the same part of the world and both are having a terrible time matching their resources with their objectives.”<sup>21</sup>

In both instances, involvement was justified for myriad reasons. British practitioners of New Imperialism felt that the system of Indirect Rule was “the most comprehensive, coherent, and renowned system of administration in British imperial history . . . , that Europe [was] in Africa for the mutual

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<sup>19</sup> MEYER & BRY SAC, *supra* note 1, at 18.

<sup>20</sup> James Reston Jr., *The Road Already Taken: How the British Colonialists Tried to Run the Middle East*, WASH. POST, July 6, 2008, at BW09 (reviewing KARL E. MEYER & SHAREEN BLAIR BRY SAC, KINGMAKERS: THE INVENTION OF THE MODERN MIDDLE EAST (2008)).

<sup>21</sup> The British Analogy, <http://historyunfolding.blogspot.com/2007/06/british-analogy.html> (last visited Jul. 6, 2009).

benefit of her own industrial classes and of the native races in their progress to a higher plane.”<sup>22</sup> The United States is now in the region invoking various *casus belli* to justify its presence in Iraq.<sup>23</sup> Regardless of the justification, the United States is seen as an imperial power.<sup>24</sup> Writing in 1970, Miles Copeland warned, “if you must change either the character or course of another government, you must do it by use of forces already existing *inside* the country. If no such active or dormant forces exist, you must try another approach, or simply adjust to an imperfect world.”<sup>25</sup> Paul Wolfowitz and the Bush administration must have missed this lesson when they jumped into bed with the Iraqi exile Ahmad Chalabi.

As did the British before them, the Americans began their engagement in Iraq without the necessary knowledge about the lands and people they were to govern. The British believed they could effectuate the “complete and necessarily rapid transformation of the façade of the existing administration from British to Arab.”<sup>26</sup> In order to structure state-society relations, the British chose to use the authority of the sheikh without a true understanding of how this tribal society functioned.<sup>27</sup> “In lieu of detailed investigations and engagement with actual conditions and practices, [the British] . . . understood [Iraq] through the distorted shorthand supplied by the dominant, cultural stereotypes of the day.”<sup>28</sup> Likewise, the United States charged headlong into Iraq without sufficient human intelligence, relying instead on information provided by political parties formed in exile. The result has been a struggle to institute a government perceived as legitimate.

Adding insult to injury, Western assistance, whether British or American, has often come with strings attached in the form of Status of Forces Agreements (SOFAs), granting foreign personnel immunity from local laws. The British “agreements” during their occupation of Egypt, the SOFA attached to a credit line for Iran,<sup>29</sup> and Washington’s current attempts to expand its extraterritorial privileges to American contractors<sup>30</sup> have been seen by the

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<sup>22</sup> See MEYER & BRY SAC, *supra* note 1, at 92.

<sup>23</sup> *Id.* at 413.

<sup>24</sup> See *id.* at 412.

<sup>25</sup> *Id.* at 374.

<sup>26</sup> TOBY DODGE, INVENTING IRAQ: THE FAILURE OF NATION BUILDING AND A HISTORY DENIED 89 (Columbia Univ. Press 2003).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at xi.

<sup>29</sup> See MEYER & BRY SAC, *supra* note 1, at 345.

<sup>30</sup> See generally Karl Meyer, *How to Lose Iraq*, NEWSWEEK, July 7-14, 2008, at 42 (arguing that status of forces agreements have deep effects on sovereignty and will continue to chill U.S. relations with the host nation).

populace as a “document for enslavement”<sup>31</sup> . . . and have “. . . crystallized outrage over . . . indirect dominion and stoked the fires of retribution.”<sup>32</sup>

As A. T. Wilson, British Colonial Administrator in Iraq, experienced almost one hundred years ago, deep divisions within his government about how Iraq should be administered, coupled with the desire to cut the cost of occupation and lack of public support due to increasing loss of life, led to British withdrawal. “The result was failure to build a liberal or even stable state in Iraq.”<sup>33</sup> The United States now finds itself in the same dilemma in the same region. Public support is dwindling and the schism in government as to the way ahead continues to widen. Lord Cromer, in dealing with insurgency in the Sudan, had to assess how British actions would resonate, not just within Egypt, but throughout the entire Muslim population of the Middle East. The United States must now take into account how its actions will be viewed, not just in Iraq or Afghanistan but in the global Muslim community at large.

Some leaders have heeded the warnings of the past. Marine General Anthony Zinni stated,

[i]f we think there is a fast solution to changing the governance of Iraq, then we don't understand history, the nature of the country, the divisions or the underneath suppressed passions that could rise up. God help us if we think this transition will occur easily. The attempts I've seen to install democracy in short periods of time where there is no history and no roots have failed. Take it back to Somalia.<sup>34</sup>

“The one truly transcendent law in the Middle East is that of unintended consequences.”<sup>35</sup> It is because of these unintended consequences that today's political and military leaders must carefully examine the consequences of the kingmakers that preceded them. Meyer and Brysac's *Kingmakers* is the place to begin.

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<sup>31</sup> MEYER & BRYSAC, *supra* note 1, at 343.

<sup>32</sup> *Id.* at 344.

<sup>33</sup> DODGE, *supra* note 26, at x.

<sup>34</sup> General Anthony Zinni, USMC (Ret.), Address at the Middle East Institute (Oct. 10, 2002).

<sup>35</sup> MEYER & BRYSAC, *supra* note 1, at 18.



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Betraying Our Troops

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